IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-753

GREAT AMERICAN FEDERAL SAVINGS & LOAN ASSOCIATION, JOHN A. VIROSTEK, JOSEPH E. BUGEL, JOHN J. DRAVECKY, DANIEL T. KUBASAK, EDWARD J. LESKO, JAMES E. ORRIS, JOSEPH A. PROKOPOVITSH, JOHN G. MICENKO, and FRANK J. VANEK,

Petitioners,

v.

JOHN R. NOVOTNY,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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v.

JOHN R. NOVOTNY,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

The Petitioners, Great American Federal Savings & Loan Association, John A. Virostek, Joseph E. Bugel, John J. Dravecky, Daniel T. Kubasak, Edward J. Lesko, James E. Orris, Joseph A. Prokopovitsh, John G. Micenko, and Frank J. Vanek, respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Third Circuit *en banc* entered in this proceeding on August 7, 1978.

OPINION BELOW

The opinion of the Court of Appeals is unofficially reported at 17 BNA FEP Cases 1252 (3rd Cr. 1978), and appears as Appendix A hereto. The opinion of the United States District Court for the Western District of Pennsylvania is reported at 430 F. Supp. 227 (W.D.Pa. 1977), and appears as Appendix B hereto.

JURISDICTION

The judgment of the Court of Appeals for the Third Circuit *en banc* was entered on August 7, 1978. This petition for certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked pursuant to 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

1. Whether the officers and directors of a corporation, admittedly acting only on behalf of that corporation at all relevant times, can form a conspiracy for purposes of 42 U.S.C. §1985(3)?

2. Whether an alleged violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e, is a deprivation of "equal privileges and immunities" for purposes of 42 U.S.C. §1985(3)?

3. Whether the commerce clause of the Constitution of the United States provides a "source of congressional power" which makes an alleged conspiracy by a private employer to deny women their Title VII rights actionable under 42 U.S.C. §1985(3)?

STATUTORY PROVISIONS INVOLVED

UNITED STATES CODE, TITLE 42

§1985. Conspiracy to interfere with civil rights

* * *

(3) Depriving persons of rights or privileges. If two or more persons in any State or Territory conspire, or go in disguise on the highway or on the premises of another, for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws, or for the purpose of preventing or hindering the constituted authorities of any State or Territory from giving or securing to all persons within such State or Territory the equal protection of the laws; or if two or more persons conspire to prevent by force, intimidation, or threat, any citizen who is lawfully entitled to vote, from giving his support or advocacy in a legal manner, toward or in favor of the election of any lawfully qualified person as an elector for President or Vice-President, or as a member of Congress of the United States; or to injure any citizen in person or property on account of such support or advocacy; in any case of conspiracy set forth in this section, if one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages, occasioned by such injury or deprivation, against any one or more of the conspirators.

STATEMENT OF THE CASE

Respondent John R. Novotny ("Novotny"), a former employee and director of corporate Petitioner, Great American Federal Savings and Loan Association ("Association"), instituted this suit in the United States District Court for the Western District of Pennsylvania on December 17, 1976.

In essence, Novotny alleges that the Association and the individual Petitioners, its directors and/or officers, violated Title VII of the Civil Rights Act of 1964 ("Title VII"), 42 U.S.C. §2000e, by discriminating against the Association's female employees in promotion opportunities and related aspects of employment (App. C at 79a).[1]

At an unspecified meeting of the Association's Board of Directors, Novotny allegedly protested on behalf of the Association's female employees. At the Association's annual meeting, on or about January 22, 1975, the Association and its directors and officers failed to reelect Novotny as an officer and terminated his employment. According to Novotny, the Association and its officers and directors took this action because of his equal employment protest. He alleges that this was in violation of 42 U.S.C. §1985(3) and Section 704(a) of Title VII, 42 U.S.C. §2000e-3(a).

The Association moved to dismiss Novotny's complaint and, on April 22, 1977, the district court granted the Association's motion and entered an order dismissing the complaint (App. B at 76a).

1. References to the Appendix hereto will be designated as "(App. ..... at .....)", with appropriate appendix and page notations.

In an opinion accompanying its April 22 order, the district court held that the only alleged act of discrimination which had affected Novotny was his termination by the directors and officers. In the district court's view, this action was not attributable to a conspiracy because the complaint alleged that "at all times relevant hereto, the individual defendants were and are acting on behalf of GAF" (App. C at 83a, ¶33). The Section 1985(3) cause of action was, therefore, dismissed.

The district court also dismissed Novotny's Title VII cause of action grounded upon the retaliation language of 42 U.S.C. §2000e-3(a). In the district court's view, this provision applied only to discrimination suffered by an individual because he or she "made a charge, testified, assisted, or participated in any manner in an investigation, proceeding or hearing" brought under Title VII. Novotny had never alleged that his termination was connected in any way with such enforcement proceedings. Novotny therefore was not a "person aggrieved" and not entitled to relief under Title VII (App. B at 74a).

An appeal followed the judgment of the district court and was argued before a three-judge panel of the United States Court of Appeals for the Third Circuit on February 16, 1978. It was later ordered that the parties file supplemental briefs and the case was reargued before the circuit court *en banc* on May 11, 1978.

In an opinion and judgment issued on August 7, 1978, the Third Circuit reversed and remanded the judgment of the district court regarding both the causes of action under Section 1985(3) and Title VII.

In reversing the dismissal of the cause of action under Section 1985(3), the Third Circuit held, among

other things, that the directors and officers could form a conspiracy despite the allegations in the complaint; a violation of the substantive rights conferred by Title VII may be remedied under Section 1985(3); and the commerce clause of the United States Constitution is the congressional source of power which makes a private conspiracy to deny women their right to equal employment opportunity actionable under Section 1985(3).

REASONS FOR GRANTING THE WRIT

1. The Decision Below Conflicts With The Decisions Of Other Courts Of Appeals As To The Existence Of A Conspiracy For Purposes of 42 U.S.C. §1985(3).

The language of 42 U.S.C. §1985(3) is quite specific in its requirement that "two or more persons" must conspire to deprive an individual of the equal protection of the laws or of equal privileges and immunities under the laws in order to establish a cause of action under that statute.

Despite its acknowledgement that such a conspiracy "requires a plurality of legal personalities as one of its elements" (App. A at 51a), the Third Circuit held that concerted action by a corporation's officers and directors, working in their official capacities, can form the requisite conspiracy.

In reaching this conclusion, the Third Circuit specifically declined to "follow the line of cases adopting the rule that concerted action among corporate officers and directors cannot constitute a conspiracy under §1985(3)" (App. A at 55a). This "rule" has been adopted, and the Third Circuit's position has been rejected,

by every other court of appeals to consider the question. *Herrmann v. Moore,* 576 F.2d 453 (2d Cir. 1978); *Girard v. 94th St. & Fifth Ave. Corp.,* 530 F.2d 66 (2d Cir. 1976), *cert. denied,* 425 U.S. 974 (1976); *Bellamy v. Mason's Stores, Inc.,* 508 F.2d 504 (4th Cir. 1974); *Dombrowski v. Dowling,* 459 F.2d 190 (7th Cir. 1972) (Stevens, J.); *Baker v. Stuart Broadcasting Co.,* 505 F.2d 181 (8th Cir. 1974). *See also McLellan v. Mississippi Power & Light Co.,* 545 F.2d 919 (5th Cir. 1977) (dissenting opinion).

The decisions of the Second, Fourth, Seventh and Eighth Circuits have their origin in the holding of *Nelson Radio & Supply Co. v. Motorola, Inc.,* 200 F.2d 911, 914 (5th Cir. 1952), *cert. denied,* 345 U.S. 925 (1953), that a "corporation cannot conspire with itself" and the acts of agents of the corporation are the acts of the corporation itself unless personally motivated. These fundamental principles have been previously recognized by the Third Circuit in other contexts. *See, e.g., Goldlawr, Inc. v. Shubert,* 276 F.2d 614 (3d Cir. 1960).

Officers and directors of a corporation cannot form a conspiracy, unless their actions are personally motivated, because their concerted activities constitute the actions of only one legal entity—the corporation. As recognized by Judge (now Mr. Justice) Stevens in *Dombrowski, supra* at 196, the substantive law allegedly violated by the conspiracy does not alter the applicability of this combination of fundamental conspiracy and corporate principles in any way.

The officers and directors in the instant case were not acting in their individual capacities because the complaint specifically alleged that they were working on behalf of the Association at all times. (App. C at 83a,

¶33). The Third Circuit, however, chose to ignore the significance of this fact and the reasoning and holdings of four other federal courts of appeals which have dismissed alleged causes of action under Section 1985(3) in identical situations.

Few corporate decisions are made by one individual. The interpretation of the Third Circuit, therefore, makes virtually every such decision the product of a conspiracy, nullifies the conspiracy requirement of Section 1985(3) and a multitude of other statutes, and inappropriately exposes corporations to increased liability. These ramifications, together with the conflict among the circuits created by the Third Circuit's unsupported decision justify the grant of certiorari to review the judgment below.

2. The Decision Below Conflicts With The Decision of Another Court Of Appeals As To The Use Of An Alleged Violation Of Title VII To Support A Cause Of Action Under 42 U.S.C. §1985(3).

The Third Circuit noted that 42 U.S.C. §1985(3) is remedial in nature (App. A at 29a), and the statute was intended to provide a federal remedy for conspiracies to deprive persons of equal protection and equal privileges and immunities under the law. The decision below also held, however, that a violation of a federal statute, and Title VII in particular, is such a deprivation (App. A at 36a).

Although the passage of Title VII did not nullify any previously enjoyed substantive rights in the civil rights area, *Johnson v. Railway Express Agency,* 421 U.S. 464 (1975), Congress clearly intended the administrative/judicial procedure outlined in Title VII to be the exclusive mechanism for enforcing the substantive rights granted by Title VII. *See McDonnell Douglas Corp. v. Green,* 411 U.S. 792 (1973) and *Alexander v. Gardner-Denver Co.,* 415 U.S. 36 (1974).

The Third Circuit's decision, however, would allow the right conferred by Title VII and Title VII alone—equal employment opportunity for women in the private sector—to be enforced under 42 U.S.C. §1985(3). This result would doubtlessly undermine Title VII's emphasis on conciliation and administrative resolution of such disputes. *See Occidental Life Insurance Co. v. Equal Employment Opportunity Commission,* 432 U.S. 355, 359-360 (1977).

This conclusion is not based on mere supposition because enforcing a Title VII right under 42 U.S.C.

§1985(3) is much more attractive to a plaintiff. Under Section 1985(3), a plaintiff can avoid administrative compliance and obtain a longer statute of limitations,[2] the right to a jury trial,[3] no limitation on back pay,[4] and punitive damages.[5]

Thus, the effect of allowing Title VII rights to be enforced under Section 1985(3) will be a needless flood of federal court employment discrimination cases which could have been resolved through the administrative

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2. The Third Circuit has recently held that the statute of limitations for alleged violations of the Civil Rights Acts of 1866 and 1870 occurring in the Commonwealth of Pennsylvania is six years. *Davis V. United States Steel Supply,* 581 F.2d 335 (3d Cir. 1978). This limitation period should be compared to the much shorter period (180 days, or 300 days in a deferral state) established by Congress for the filing of a charge with the Equal Employment Opportunity Commission to enforce Title VII rights. 42 U.S.C. §2000e-5(c). This Court has recently emphasized the importance of such a timely filing with the Commission. *Evans v. United Air Lines, Inc.,* 431 U.S. 553 (1977).

3. *See, e.g., Cameron v. Brock,* 473 F.2d 608 (6th Cir. 1973); *Don v. Okmulgee Memorial Hospital,* 443 F.2d 234 (10th Cir. 1971). There is no right to a jury trial under Title VII. *Johnson v. Georgia Highway Express,* 417 F.2d 1122 (5th Cir. 1969); *Slack v. Havens,* 522 F.2d 1091 (9th Cir. 1975).

4. Title VII contains a two-year statutory limitation on back pay. 42 U.S.C. §2000e-5(g).

5. Unlike Section 1985(3), punitive damages are not available under Title VII. Compare *Murphy v. Local Union No. 18,* ..... F. Supp. ....., 99 LRRM 2074 (N.D. Ohio 1978) (Punitive damages awarded under Section 1985(3)) to *Richerson v. Jones,* 551 F.2d 918 (3d Cir. 1977) (Punitive damages may not be awarded in Title VII suit).

and conciliatory processes of Title VII as intended by Congress.

The Fourth Circuit, in *Doski v. Goldseker Co.,* 539 F.2d 1326 (4th Cir. 1976), recognized that an interpretation such as the Third Circuit's would significantly undermine the Title VII enforcement scheme. Consequently, that court refused to allow an alleged violation of Title VII to establish a cause of action under 42 U.S.C. §1985(3). The reasoning of the Fourth Circuit, however, was totally rejected in the decision below (App. A at 38a).

This conflict provides yet another reason for the grant of certiorari to review the decision below.

3. The Decision Below Conflicts With The Statutory Analysis Previously Developed By This Court And Sanctions An Unconstitutional Application Of 42 U.S.C. §1985(3).

In *Griffin v. Breckenridge,* 403 U.S. 88, 104 (1971), this Court held that the analysis of the existence of a cause of action under 42 U.S.C. §1985(3) requires the identification of "a source of congressional power to reach the private conspiracy alleged by the complaint."[6] In *Griffin* the Thirteenth Amendment was identified as a constitutional source of congressional power, and the Court declined to discuss the applicability of the Fourteenth Amendment. *Id.*

The decision below, however, did not rely on any of the enabling clauses of the Civil War constitutional

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6. This portion of the analysis is necessary to prevent the type of unconstitutional applications of Section 1985(3) which voided its criminal counterpart, R.S. §5519. *United States v. Harris,* 106 U.S. 629 (1883).

amendments. Rather, the Third Circuit held that the private conspiracy in this case could be reached under the commerce clause of the Constitution of the United States (App. A at 49a). This conclusion was based on the assumption that if Congress could constitutionally enact Title VII pursuant to the commerce clause, it could likewise prohibit, under Section 1985(3), conspiracies to violate Title VII pursuant to the commerce clause.

The Third Circuit, however, never examined Section 1985(3) to determine whether Congress intended it to be such a statute. To the contrary, the legislative history indicates that the Civil War constitutional amendments are the source of Section 1985(3);[7] the legislative history is devoid of any mention of the commerce clause; and the commerce clause was interpreted as an extremely narrow source of power for the enactment of legislation at that time.[8]

Moreover, unlike other legislation passed pursuant to the commerce clause, Section 1985(3) contains none of the constitutionally mandated jurisdictional requirements which determine whether a defendant sufficiently affects interstate commerce to fall within the scope of this congressional source of power. *Compare, e.g.,* the Fair Labor Standards Act, 29 U.S.C. §213, and Title VII, 42 U.S.C. §2000e(b), *with* 42 U.S.C. § 1985(3). *See also Heart of Atlanta Motel, Inc. v. United States,* 379 U.S. 241, 253-262 (1964).

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7. Section 1985(3) originated as Section 2 of the Enforcement Act of 1871 (Act of April 20, 1871, Ch. 22, 17 Stat. 13). This Act was entitled, "An Act to Enforce the Provisions of the Fourteenth Amendment to the United States Constitution and For Other Purposes."

8. *See, e.g., Lochner v. New York,* 198 U.S. 45 (1905).

The commerce clause was therefore, never intended to be a source of power which determines the reach of Section 1985(3) and, without jurisdictional limitations, it cannot be used in that fashion now. Under the decision of the Third Circuit, however, a plaintiff can state a Title VII-based cause of action under Section 1985(3) against a corporate employer even though that employer fails to meet the jurisdictional standards of Title VII because it does not sufficiently affect interstate commerce.[9]

This unconstitutional, irrational result occurs because the Third Circuit's analysis incorrectly focused on the constitutionality of the right allegedly violated by the conspiracy—*i.e.* Title VII—without considering the constitutional power to protect that right from the activities of private conspiracies under Section 1985(3). The commerce clause may serve as the source of power for Title VII itself, but, as explained above, it cannot be a source of power to reach private conspiracies under Section 1985(3).

Thus, this distortion of the analysis developed in *Griffin* allows unconstitutional applications of Section 1985(3) and greatly expands the scope of that statute despite the concerns of this Court. *Griffin supra,* at 101. The grant of the petition to review the decision below is, therefore, justified and necessitated by this conflict with the principles enunciated in *Griffin v. Breckenridge.*

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9. For example, Title VII assumes that corporate employers with fewer than fifteen (15) employees do not sufficiently affect interstate commerce, and they are therefore not subject to Title VII. 42 U.S.C. §2000e(b). Under the Third Circuit's decision, however, these corporations are liable under Section 1985(3) if two or more agents of the corporation deprive an employee of Title VII rights.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Third Circuit.

Respectfully submitted,

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APPENDIX A

United States Court of Appeals

FOR THE THIRD CIRCUIT

NO. 77-1756

JOHN R. NOVOTNY,

Appellant

v.

GREAT AMERICAN FEDERAL SAVINGS & LOAN ASSOCIATION, JOHN A. VIROSTEK, JOSEPH E. BUGEL, JOHN J. DRAVECKY, DANIEL T. KUBASAK, EDWARD J. LESKO, JAMES E. ORRIS, JOSEPH A. PROKOPOVITSH, JOHN G. MICENKO and FRANK J. VANEK

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

C.A. No. 76-1580

Argued February 16, 1978

(Opinion filed August 7, 1978)

Before: SEITZ, *Chief Judge,* ROSENN and GARTH, *Circuit Judges*

Reargued May 11, 1978 En Banc

Before: SEITZ, *Chief Judge,* ALDISERT, ADAMS, GIBBONS, ROSENN, HUNTER, WEIS, GARTH and HIGGINBOTHAM, *Circuit Judges*

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OPINION OF THE COURT

ADAMS, Circuit Judge

Advocacy of equal rights has seldom been a completely secure vocation. Whether out of fear or for less attractive motives, certain individuals view the advance of equality as a threat to be opposed. Those who take up the cause of equal rights run the risk that their persons and property will suffer the consequences of their opponents' hostility. In days past, this risk exposed individuals to serious harm. Harassment was routine; more serious threats and physical injury were not uncommon. Fortunately, however, such flagrant retaliation has largely subsided. In this case we are called upon to determine whether statutory provisions which

did service against the violent assaults on equal rights advocates in earlier times or other, comparable, legislative enactments can guard against less dramatic retribution.

The precise issue here is whether 42 U.S.C. § 1985(3) and 42 U.S.C. §2000(e) (Title VII) protect an employee who claims to have been discharged because his actions and advocacy stood in the path of a plan to deprive women of their equal employment rights.

I. FACTS

John R. Novotny, the plaintiff, began work with Great American Federal Savings and Loan Association (GAF) in 1950. During subsequent years he rose through the ranks to become the Secretary of the company and a member of its board of directors. In the course of his employment, Novotny alleges that he discovered that the individual defendants in this action, officers and board members, "intentionally and deliberately embarked upon and pursued a course of conduct the effect of which was to deny female employees equal employment opportunity."[1]

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1. According to the complaint:
Said course of conduct was characterized by some or all of the following actions, *inter alia:*
(a) Promoting male employees with less experience, fewer years of service and less qualification over more qualified female employees;
(b) Providing education and training to male employees which was not provided to female employees;
(c) Making known to male employees job vacancies were not made known to female employees;
(d) Evaluating male employees in accordance with different and subjective criteria than those applied to female employees;

During the summer of 1974, the GAF board of directors became engaged in a dispute with one Betty Batis, a female employee, who claimed to have been the victim of sex discrimination. According to Novotny's complaint, he took up Batis' cause at a subsequent board meeting and expressed the view that GAF had not met its legal obligations with regard to equal employment opportunity.

The other members of the board voted in January 1975 to terminate Novotny's employment with GAF. On the basis of that termination, Novotny promptly filed an unlawful employment practice charge with the EEOC, and was granted a right to sue letter in December of 1976. Claiming that his dismissal was a reprisal for his advocacy of the cause of equal rights for women in the corporation, Novotny then brought the present action against GAF, officers of the company and individual members of the board of directors.[2] Novotny alleged

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(e) Categorizing certain jobs as "male" or "female" and promoting in accordance with these categories;

(f) Creating an atmosphere inimical to the asperations of female employees than to male employees;

(g) By providing different and lesser degrees of fringe benefits to female employees than to male employees;

(h) By demoting qualified female employees and replacing them with less qualified male employees.

2. The complaint named John A. Virostek, Chairman of the Board, Joseph E. Bugel, Vice Chairman of the Board, John J. Dravecky, Vice President of GAF, Daniel Kubasak, President of GAF, John Micenko, Treasurer of GAF, Frank Vanek, Controller of GAF, James Orris, former President of GAF, and Joseph Pro-

that the retaliatory discharge imposed upon him constituted an infraction of Section 2 of the Ku Klux Klan Act of 1871,[3] and Title VII of the Civil Rights Act of 1964.[4]

Pursuant to a motion filed under Rule 12(b)(6), the district court dismissed both of Novotny's claims. Because the individual defendants were employees of a single corporation, the trial judge held that they were legally incapable of conspiring in violation of § 1958(3). And, in the court's view, Title VII offered the plaintiff no protection because Novotny had not been discharged as a result of any involvement in a formal EEOC proceeding.

Novotny's timely appeal brought the case before us.

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kopovitsh, a member of the Board of Directors. We were informed at oral argument that a similar sex-discrimination suit is currently pending in the district court on behalf of Ms. Batis.

3. 42 U.S.C. § 1985(3) (1970) reads:
If two or more persons in any State or Territory conspire or go in disguise on the highway or on the premises of another, for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws; . . . if one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages, occasioned by such injury or deprivation, against any one or more of the conspirators.

4. 42 U.S.C. § 2000e *et seq.* (1970).

II. The Conspiracy Counts: § 1985(3)

Defendants challenge the plaintiff's § 1985(3) claim on three grounds. They allege that: (1) as a matter of statutory construction, § 1985(3) confers no redress for grievances such as the one in this case; (2) as a matter of constitutional law, if such redress is provided then § 1985(3) would exceed the powers of Congress; (3) as a matter of definition, officers and directors of a single corporate entity are legally incapable of forming a "conspiracy."

Both in briefs and at oral argument, the parties have occasionally combined discussion of the first and second grounds of objection. However, Congress' intention with respect to the coverage of § 1985(3) is a distinct issue from Congressional power under the Constitution to pass such legislation. Clear analysis therefore requires that the issue of the intended scope of the legislation and its proper construction be examined separately from the question whether such scope is constitutionally authorized. Since defendants' success on the statutory construction issue would obviate the need to explore an unsettled area of constitutional law, we turn first to an examination of the statutory structure.

A. *Background: An Overview of the History of § 1985(3)*

The statute now codified as 42 U.S.C. § 1985(3) began its existence as a part of Section 2 of the Act of April 20, 1871 (the Ku Klux Klan Act.[5] The 1871 Act

5. Section 2 as quoted in *Brawer v. Horowitz*, 535 F.2d 830, 837-38 n.15 (3d Cir. 1976) in its entirety is reproduced as appendix I to this opinion.

was one of several Congressional reactions to the continued violent resistence to Reconstruction in the South.[6] Consideration of the Act was triggered by a message sent to Congress by President Grant on March 23, 1871, warning that "[a] condition of affairs now exists in some States of the Union rendering life and property insecure and the carrying of the mails and the collection of the revenue dangerous," and calling for legislation to remedy this situation.[7] The Congressional response embodied in the 1871 Ku Klux Klan Act included the grant of a civil cause of action against those who deprived persons of constitutional rights under color of state law (later codified as 42 U.S.C. § 1983), the authorization of deployment of federal troops and suspension of habeas corpus in certain situations, and the establishment of criminal penalties for conspiracies to obstruct justice and to interfere with "equal protection" or "equal privileges and immunities." In section 2 of the legislation, the predecessor of § 1985(3), Congress also created a cause of action for persons injured by acts done in furtherance of such conspiracies.

With the cooling of Reconstructionist ardor, the reception accorded to the Ku Klux Klan Act in the courts was not a hospitable one. In *United States v. Harris*,[8] the Supreme Court sustained a demurrer to an indictment, under the Act's conspiracy provisions, of 20 southern whites charged with lynching a black, and declared such criminal penalties unconstitutional as a

6. *See Monroe v. Pape*, 365 U.S. 167, 177-180 (1961).

7. *Id.* 172-73

8. 106 U.S. 629 (1882). *See also United States v. Cruikshank*, 92 U.S. 542 (1875).

usurpation of the states' role in protecting liberty and property.

This holding was reaffirmed by *Baldwin v. Franks*,[9] which granted habeas corpus to a member of a group of Californians who had driven resident Chinese aliens out of town in violation of the treaty rights of the Chinese citizens. While conceding that the federal government might have the power to protect treaty rights through criminal sanctions, the Supreme Court held that since the criminal provisions protected *all* privileges and immunities they were invalid.

Following *Harris* and *Baldwin*, Section 2 of the 1871 Act languished largely unused for seventy years.[10]

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9. 120 U.S. 678 (1887).

10. *See e.g.* Gressman, *The Unhappy History of Civil Rights Legislation*, 50 Mich. L. Rev. 1323 (1952); Note, *Federal Power to Regulate Private Discrimination; The Revival of the Enforcement Clauses of the Reconstruction Era Amendments*, 74 Col. L. Rev. 449, 451-54 (1974); Note, *The Proper Scope of the Civil Rights Acts*, 66 Harv. L. Rev. 1285, 1286-87 (1953); *Developments in the Law—Section 1983 and Federalism*, 90 Harv. L. Rev. 1133, 1153-1161 (1977).

A sign of possible resurrection appeared in *Hague v. CIO*, 307 U.S. 496 (1939), where a divided Supreme Court, relying on the predecessors to § 1983 and § 1985 (3), granted relief against discriminatory action by a city to harass political meetings. The Court acted either on the ground that the right to assemble and discuss matters relating to national issues (here the NLRA) was a privilege and immunity of national citizenship (opinion of Justice Roberts) or on the ground that the action denied equal protection (opinion of Justice Stone). The promise of *Hague* remained largely unfulfilled, however. Moreover, in *Snowden v. Hughes*, 321 U.S. 1, 8-12 (1944), the Supreme Court held that § 1985 (3) reached only "intentional or purposeful discriminations between persons or classes;" rather than simply denials of right.

And in 1952, the Supreme Court further cut back on the statute's apparently broad scope in *Collins v. Hardyman*.[11] In response to a claim under the civil conspiracy provisions originally contained in the Act, the Court held that the 1871 Act protected only against deprivations of rights brought about by state action.[12] There the matter rested until 1971, when the Supreme Court gave new life to the civil conspiracy provisions of the Ku Klux Klan Act [now recodified as 42 U.S.C. § 1985 (3)] in *Griffin v. Breckenridge*.[13]

In *Griffin*, the three black plaintiffs were attacked and beaten on a highway in Mississippi by whites who were under the mistaken impression that their victims were associates of a civil rights worker. The blacks brought suit against their assailants under § 1985(3), claiming to have been deprived of various privileges and immunities under the laws of the United States and the State of Mississippi, including the rights of free speech, assembly, association, movement, liberty and security of their persons. The suit was dismissed in the district court, and on the basis of *Collins* the Court of Appeals reluctantly sustained the dismissal. The Supreme Court, however, reversed.

First the Court explained that the constitutional difficulties which shaped the result in *Collins* twenty years earlier had been dissipated by intervening cases. It then held that, at least in a situation where the right to interstate travel is implicated or where a federal power to abolish the badges and incidents of slavery

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11. 341 U.S. 651 (1951).

12. *Id.* at 659, 661-62.

13. 403 U.S. 88 (1971).

under the Thirteenth Amendment can be invoked, no state action is required to establish the constitutional power to regulate private activity.[14] The Court proceeded to examine the legislative history of § 1985(3), and, finding no reason to decline to accord the terms of the statute their full sweep, sustained the plaintiffs' claim.

Nonetheless, *Griffin* expressed sensitivity to the potential that the expansive syntax of § 1985(3) would give rise to a "general federal tort law." To guard against this possibility, the Court looked to the legislative history, which had stressed the adoption of language regarding "*equal* protection of *equal* privileges and immunities" as a limitation on the reach of § 1985(3).[15] Read in light of this history, a cause of action based on a conspiracy to deprive one of equal protection or equal privileges and immunities requires that there must be some racial, or otherwise class based,

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14. The Court stated that "many of the constitutional problems perceived [in *Collins*] simply do not exist." 403 U.S. at 96-97. Later in the opinion, the Court undertook an analysis of the basis for Congressional power to regulate the conduct at issue. It concluded that Congress was authorized to deal with private conspiracies to assault blacks on the highways both under the enforcement clause of the 13th Amendment, and under the powers of the national government to protect the right of interstate travel. *Id.* 104-106.

The defendants contend that both of these bases were necessary to the outcome of *Griffin*. Our reading of the case is that the 13th Amendment and the right to travel were alternative rationales. *See id.* at 107. ("In identifying these two constitutional sources of congressional power, we do not imply the absence of any other.")

15. *Id.* at 102 (emphasis in original).

invidiously discriminatory animus underlying the conspirators' action. The conspiracy, in other words, must aim at a deprivation of the equal enjoyment of rights secured by law to all.[16]

B. *The Reach of § 1985(3)*

(1) *Class Based Animus*

Despite the broad wording of the statute, the Supreme Court avoided interpreting § 1985(3) as a "general federal tort law . . . by requiring, as an element of the cause of action, the kind of invidiously discriminatory motivation stressed by the sponsors of the limiting amendment."[17] And in § 1985(3) litigation subsequent to *Griffin*, the element of class-based invidiously discriminatory animus has, in the words of one commentator, acted as a "threshold requirement,"[18] screening out a variety of § 1985(3) claims at an early stage.[19]

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16. *See id.*

17. *Id.*

18. Note, *Civil Rights—State Action is a Requirement for the Application of § 1985(3) to First Amendment Rights*, 54 N.C. L. Rev. 677, 683 (1977).

19. *E.g. Dacey v. Dorsey*, 568 F.2d 275 (2d Cir. 1978) (individual who sued bar association challenged failure of members of bar association to recuse themselves from his case; no class based discrimination alleged); *Jennings v. Shuman*, 567 F.2d 1213 (3d Cir. 1977) (no class base alleged for malicious prosecution); *Meiners v. Moriarity*, 563 F.2d 343 (7th Cir. 1977) (false arrest suit alleged no class-based animus); *Regan v. Sullivan*, 557 F.2d 300 (2d Cir. 1977) (false arrest suit alleged no class-based animus); *Atkins v. Tanning*, 556 F.2d 485 (10th Cir. 1972) (no class-based animus alleged in false arrest suit); *Phillips v. Intl. Assn. of Bridge Workers*, 556 F.2d 939 (9th Cir. 1977) (dissident

In determining the applicability of § 1985(3) to the case before us, therefore, an initial inquiry must be whether the actions which form the basis for this case are the off-spring of a "class-based invidiously discriminatory animus" within the meaning of the *Griffin* test.

(a) *Women as a class*

(i) *Women Were Not Excluded from § 1985(3)*

As an opening thrust, defendants urge that, when read in its historical context, § 1985(3) could not have

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union members not a class); *Morgan v. Odem,* 552 F.2d 147 (5th Cir. 1977) ("newcomers" not a class); *Askew v. Bloemker,* 548 F.2d 673 (7th Cir. 1976) (suit for illegal search of home alleged no class-based animus); *McLellan v. Mississippi Power & Light Co.,* 545 F.2d 919 (5th Cir. 1977) (en banc) (bankrupts not a class); *Brawer v. Horowitz,* 535 F.2d 830 (3d Cir. 1976) (no allegation of class-based conspiracy); *Hahn v. Sargent,* 523 F.2d 461 (1st Cir. 1975) *cert. denied* 425 U.S. 904 (1976) (no class-based animus alleged in attempt to damage political career); *Harris v. Brooks,* 519 F.2d 1358 (1st Cir. 1975) (homeowners affected by zoning changes not a class); *Arnold v. Tiffany,* 487 F.2d 216 (9th Cir. 1973) *cert. denied* 415 U.S. 984 (1974) (newspaper dealers desiring to form a trade association not a class); *Hughes v. Ranger Fuel Corp.,* 467 F.2d 6, 8-10 (4th Cir. 1972) (company's action against environmentalists held a response to individual's actions, not class-based); *Jacobson v. Industrial Foundation,* 456 F.2d 258 (5th Cir. 1972) (applicants for workman's compensation are not a class); *Cf. Downs v. Sawtelle,* 77-1260 (1st Cir. March 30, 1978) slip op. (deaf may not be a class); *See generally* Note, *The Scope of Section 1985(3) Since Griffin v. Breckenridge,* 45 Geo. Wash. L. Rev. 239, 252-58 (1976) (discussing cases); Note, *Private Conspiracies to Violate Civil Rights,* 90 Harv. L. Rev. 1721, 1727-29 (1977) (discussing cases).

contemplated punishing conspiracies against women. Therefore, they suggest, sex-based conspiracies cannot form the predicate for a cause of action under § 1985(3).

While some of the individuals who voted for § 1985(3) may not have been sympathetic to equal rights for women,[20] the interpretation of statutes is not, in the face of contrary language, tied to the subjective expectations of particular legislators. The fact is that the wording of § 1985(3) gives no basis for excluding women from its protection—rather, the phrases of the statute are attuned to the evolving idea of equality.

Section 2 of the Act was cast in general terms; it proscribed conspiracies aimed at depriving "any person or any class of persons" of equal protection and equal privileges. The breadth of such language was not adventitious. While the impetus toward enactment of the lineal ancestor of § 1985(3) was supplied by concern regarding violence directed at blacks and Union sympathizers,[21] the bill subsequently enacted contained no

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20. *Cf. Bradwell v. Illinois,* 83 U.S. (16 Wall.) 130 (1873). Concurring in the decision to uphold the refusal of the Illinois Supreme Court to admit women to its bar, Justice Bradley, joined by Justices Swayne and Field (the other two dissenters in the *Slaughterhouse Cases)* wrote:

> [T]he civil law, as well as nature herself has always recognized a wide difference in the respective spheres and destinies of man and woman. Man is, or should be, woman's protector and defender.

21. *Monroe v. Pape,* 365 U.S. 167, 178 (1961).

such limitations.[22] As Judge Aldisert noted in *Brawer v. Horowitz*,[23] Senator Edmunds, in reporting the amendments of the Ku Klux Klan Act to the Senate, interpreted the Act to command that:

> If . . . it should appear that this conspiracy was formed against a man because he was a Democrat, if you please, or because he was a Catholic, or because he was a Methodist, or because he was a Vermonter . . . this section could reach it.[24]

Consequently, we find it difficult to conclude that Congress affirmatively intended to exclude women from protection. Indeed, the sole specific reference to women

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22. Congressional Globe, 42d Cong., 1st Sess. (1871) [hereinafter, *Cong. Globe*] at 484. Indeed, in opposition to the Act, Representative Harris admitted that "There is one good feature in this bill; that is, it applies to all." Representative Shellabarger, the Chairman of the House Select Committee which drafted the Ku Klux Klan Act and a prime spokesman for the Bill's proponents in the House, first made this point with relation to its first section, later to become § 1983. *Cong. Globe* at App. 68. He reiterated, however, that "The provisions of the 14th Amendment are wholly devoted to securing the equality and safety of all the people, as is this section, and indeed the entire bill. . . ." *Id.*

23. 535 F.2d 830, 839 (3d Cir. 1976).

24. *Cong. Globe* at 567. *See also Griffin*, 403 U.S. at 102 n.9; Representative Kelley at *Cong. Globe* 339 ("A government that cannot protect the humblest man within its limits, that cannot snatch from oppression the feeblest woman or child is not a government."); Representative Sumner *id.* at 651 ("Let the humblest citizen in the remotest village be assailed in the enjoyment of equal rights, and the nation must do for that humblest citizen what it would do for itself . . . Equality implies universality, and what is universal must be national.").

that we have been able to discover in the legislative history implies to the contrary. In the debate on the scope of the term "privileges and immunities," in the proposed § 2 of the 1871 Act, Senator Trumbull sought to prove that the right to vote was not a "privilege or immunity" because women could not exercise the franchise.[25] The burden of his argument seems to have been that women were protected in the enjoyment of rights which could properly be classified as "privileges and immunities" and therefore rights from which women were admittedly excluded could not be "privileges and immunities." The underlying premise of this reasoning was that women are within the reach of § 2.[26]

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25. *Cong. Globe* at 576. A similar theory was adopted in *Minor v. Happersett*, 88 U.S. (21 Wall) 162, 169-70 (1874) upholding a denial of female suffrage. The plaintiff, said the Court

> has always been a citizen from her birth, and entitled to all the privileges and immunities of citizenship. . . . If the right of suffrage is one of the necessary privileges of a citizen of the United States, then the Constitution and laws of Missouri, confining it to men are . . . void.

The Court concluded that voting was not such a privilege or immunity.

26. Our conclusion that women were not excluded from § 1985(3) is buttressed by the interpretation which courts have accorded § 1983. As has been often noted, § 1983 constituted the first section of the Ku Klux Klan Act, which also included the ancestor of § 1985(3). *E.g. Monroe v. Pape*, 365 U.S. 167, 180-81 (1961), *id.* at 199-202 (Harlan, J. concurring); *id.* at 229,234 (Frankfurter, J. dissenting); *Monell v. Department of Social Services*, 46 U.S.L.W. 4569, 4572-73 (1978). *Cf. Cary v. Piphus*, 46 U.S.L.W. 4224, 4226 n.10 (1978) (construing § 1985(3) and § 1983 *in pari materia*). The fact that the Supreme Court has had no difficulty in entertaining claims of sex discrimination under § 1983 makes it diffi-

The history of the statute thus leads us to determine that the language of § 1985(3) should not be unnaturally cropped to exclude women from its protection.

Chief Justice Warren wrote in a comparable context:[27]

> Throughout our history differences in race and color have defined easily identifiable groups which have at times required the aid of the courts in securing equal treatment under the laws. But community prejudices are not static, and from time to time other differences from the community norm may define other groups which need the same protection.

(ii) *Discrimination against women is "invidious class-based" discrimination*

Although we can ascertain that § 1985(3) was intended to have a rather broad sweep, it is nonetheless difficult to parse the precise dimensions of the "classes"

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cult to conclude that Congress intended to exclude women from protection under § 2 of the 1871 Act. *E.g. Monell v. Department of Social Services,* 46 U.S.L.W. 4569 (1978); *Craig v. Boren,* 429 U.S. 190 (1976) *reversing Walker v. Hall,* 399 F. Supp. 1304, 1306 (W.D. Okla. 1975) (relief sought under § 1983).

27. *Hernandez v. Texas,* 347 U.S. 475, 478 (1954) (holding that jury discrimination against Mexican-Americans was equal protection violation). The Congressmen who enacted § 1985(3) were not oblivious to the possibility that altered social circumstances could bring oppression upon new classes in society. *See* Senator Ames, *Cong. Globe* 570: ("Man changes so little in centuries even that political creeds are visited by the same punishments that Christianity received at pagan hands in ages past.").

which the Congress sought to protect, for, as the Supreme Court noted in *Tenney v. Brandhove,* "The limits of §§ 1 and 2 of the 1871 statute . . . were not spelled out in debate."[28]

In interpreting the language of the statute, the Supreme Court in *Griffin* said:

> The language requiring intent to deprive of *equal* protection, or *equal* privileges and immunities, means that there must be some racial, or perhaps otherwise class-based, invidiously discriminatory animus behind the conspirators' action.[29]

We need not determine here what classes other than those distinguished by race or gender may be within the ambit of § 1985(3). The Court in *Frontiero v. Richardson*[30] remarked: "Congress itself has concluded that classifications based upon sex are inherently invidious." And in discussing discrimination, the Court pointed out that sex, like race and national origin, is an immutable characteristic determined by the accident of birth and that the sex characteristic frequently bears no relation to ability to perform or contribute to society.[31] Thus, to deprive members of a class founded on gender of equal protection or equal privileges and immunities without any justification is to act in an irrational and odious manner—hence, with an invidiously discriminatory animus.[32]

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28. 341 U.S. 367, 376 (1951).
29. 403 U.S. at 102.
30. 411 U.S. 667, 687 (1973) (plurality opinion).
31. *See e.g., Kahn v. Shevin,* 416 U.S. 351 (1974); *Reed v. Reed,* 404 U.S. 71 (1971).
32. *E.g. Arnold v. Tiffany,* 359 F. Supp. 1034, 1036 (C.D. Cal.), *aff'd on other grounds,* 487 F.2d 216 (9th

The principle that individuals should not be discriminated against on the basis of traits for which they bear no responsibility makes discrimination against individuals on the basis of immutable characteristics repugnant to our system.[33] The fact that a person bears no responsibility for gender, combined with the pervasive discrimination practiced against women,[34] and the emerging rejection of sexual stereotyping as incompatible with our ideals of equality[35] convince us that whatever the outer boundaries of the concept, an animus directed against women includes the elements of a "class-based invidiously discriminatory" motivation.

We therefore join the two circuits that have included sex discrimination within the categories of animus condemned by § 1985(3).[36]

Cir. 1973), *cert. denied* 415 U.S. 984 (1974) (class of newsdealers who wished to form trade association held not to be a "class" within the meaning of § 1985(3)); *Harrison v. Brooks,* 519 F.2d 1358 (1st Cir. 1975) (class of homeowners adversely affected by zoning change held not to be a "class" within the meaning of § 1985(3)).

33. *See e.g., Weber v. Aetna Casualty & Surety Co.,* 406 U.S. 164, 175 (1972). *Cf. Murphy v. Mt. Carmel H.S.,* 543 F.2d 1189 (7th Cir. 1976) (suggests that non-union members subject to discrimination cannot constitute a class under *Griffin* because constituency of a union is dependent on circumstances).

34. *See e.g. Frontiero v. Richardson,* 411 U.S. 677, 684-87 (1973).

35. *See* e.g. *Craig v. Boren,* 429 U.S. 190, 198-99 (1977).

36. *Conroy v. Conroy,* No. 77-1343 (8th Cir. 1978), slip op. at 3 (explicitly recognized a sex discrimination claim under § 1985(3)). And while in *Cohen v. Illinois Inst. of Technology,* 524 F.2d 818 (7th Cir. 1975), *cert. denied* 425 U.S. 943 (1976) (Stevens, J.), the Seventh

(b) *Novotny's Standing*

Even if sex discrimination is an "invidious class-based animus" within the intendment of *Griffin,* the defendants argue, Novotny has no standing to raise a § 1985(3) claim, since as a male, the animus toward females was not directed at him. We believe, however, that this claim is at odds with the statutory language, purpose and legislative history.

Section 1985(3) provides for a cause of action in any instance where "in furtherance of the object of" a proscribed conspiracy an act is done "whereby another is injured in his person or property." By its terms, the statute gives no hint of any requirement that the "other" must have any relationship to the

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Circuit rejected a sex discrimination claim grounded directly on a violation of the Fourteenth Amendment because of a lack of what it regarded as the requisite state action, dicta in subsequent cases consistently list "sex" as a "class" cognizable under *Griffin. Meiners v. Moriarity,* 563 F.2d 343, 348 (7th Cir. 1977); *Murphy v. Mt. Carmel High School,* 543 F.2d 1189, 1192 n.1 (7th Cir. 1976); *Askew v. Bloemker,* 548 F.2d 673, 678 (7th Cir. 1976). *Cf. Girard v. 95th St. & Fifth Ave. Corp.,* 530 F.2d 66 (2d Cir.), *cert. denied* 425 U.S. 974 (1976) (dismissing sex discrimination claim on the ground that no conspiracy was present); *Weise v. Syracuse University,* 522 F.2d 397 (2d Cir. 1975) (reversing dismissal of § 1985(3) sex discrimination suit for want of state action, but reserving question of whether sex discrimination comes within statute); *Canavan v. Beneficial Finance Corp.,* 553 F.2d 860 (3d Cir. 1977) (reversing on procedural grounds dismissal of sex discrimination suit under § 1985(3)); *Doski v. M. Goldseker Co.,* 539 F.2d 1326, 1334 (4th Cir. 1976) (dismissing complaint on statutory preemption grounds); *Baker v. Stuart Broadcasting Co.,* 505 F.2d 181 (9th Cir. 1974) (dismissing sex discrimination claim on the ground that no conspiracy present).

"person or class of persons" which the conspiracy seeks to deprive of equal protection, privileges or immunities.

Nor does the legislative history betray any intimation that a cause of action under § 1985(3) presupposes membership in the class against which the conspiracy is directed. As Senator Edmunds stated: "This section gives a civil action to *anybody* who may be injured by the conspiracy."[37] Likewise, the testimony regarding the problems which the Act attempted to solve is replete with references to individuals in situations analogous to that of Novotny. Representative Buckley adverted to the fate of "William C. Luke, an educated man from the North who spoke several languages, and who was an enthusiast on the subject of educating and elevating the colored race."[38] Mr. Luke, apparently a white man, was hanged at midnight by the Ku Klux Klan for his activities. Representative Shellabarger referred to one Mr. Allen, by all indications a white man, who was "shot at and banished for teaching colored children to read,"[39] and to Reverend Corless, likewise apparently not a black man, a minister sent from Philadelphia to "preach to the colored men," who was "scourged near unto death."[40] *Id.* Summarizing the activities of the Ku Klux Klan, Representative Perry declared:

> Their operations are . . . directed chiefly against blacks *and against white people who by any means attract attention as earnest friends of the blacks.*[41]

37. *Cong. Globe,* 568 (emphasis added).
38. *Cong. Globe,* App. 192-93.
39. *Cong. Globe,* 517.
40. *Id.*
41. *Cong. Globe,* App. 78.

In light of this history, we do not believe that Congress intended to immunize Klansmen when their victims happened to be white. By analogy, members of a conspiracy to deprive women of equal rights are liable under § 1985(3) to persons who are injured in furtherance of the object of the conspiracy, whether male or female.

This determination draws further sustenance from the Supreme Court's holding in *Sullivan v. Little Hunting Park.*[42] There the Court summarily determined that a white person expelled from membership in an all-white swimming club for advocating the membership of a black person could maintain an action under § 1982. Despite the fact that § 1982 gave no explicit cause of action to those injured in the course of conduct which it prohibited, the Court said:

> We turn to Sullivan's expulsion for the advocacy of Freeman's cause. If that sanction, backed by a state court judgment can be imposed, then Sullivan is punished for trying to vindicate the rights of minorities protected by § 1982. Such a sanction would give impetus to the perpetuation of racial restrictions on property. . . . Under the terms of our decision in *Barrows,* there can be no question but that Sullivan has standing to maintain this action.[43]

42. 396 U.S. 229 (1970).

43. *Id.* at 327. *See Tillman v. Wheaton-Haven Rec. Assn.,* 410 U.S. 431 (1973).

The suggestion that to allow non-members of the class standing would set loose a deluge of § 1985(3) claims of the "general tort law" variety is undercut by the experience of this Circuit. In *Richardson v. Miller,* 446 F.2d 1247 (3d Cir. 1971), we reversed the dismissal of a claim by a white employee who allegedly had been

Given the wording of the statute and the history canvassed above, as well as the Court's pronouncement in *Little Hunting Park,* a similar conclusion follows *a fortiori* in the case before us.

Finally, a close reading of *Griffin* itself compels the conclusion that an action under § 1985(3) need not be predicated on a conspiracy involving invidious animus directed against the plaintiff personally. In *Griffin* the three plaintiffs had ridden to the place where they were attacked in a car owned by R. G. Grady, who was not involved in the suit. The complaint alleged that the assailants were under the mistaken impression that Grady was a civil rights worker. In determining that a cause of action had been made out under § 1985 (3), the Supreme Court stated:

> Finally, the petitioners—*whether or not the non-party Grady was the main or only target of the conspiracy*—allege personal injury resulting from those [conspiratorial] acts.[44]

There is no intimation that, had one of the plaintiffs in *Griffin* been a white civil rights worker, he would have been denied the cause of action which his black compatriots were granted.

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fired because of his advocacy of racial equality by his employer. In the seven years since *Richardson* no tide of spurious § 1985(3) litigation has yet engulfed our courts.

44. 403 U.S. at 103; *cf. Herrman v. Moore,* 77-6184 (2d Cir. May 10, 1978) (Black plaintiff who alleged he had been fired for advocating hiring of blacks brought a § 1985(3) suit. Summary judgement for the defendants was affirmed because insufficient evidence was presented that plaintiff had been discharged because of such advocacy).

Novotny asserts in his complaint that his employment was terminated as a result of his support of equal opportunity claims of the female employees of GAF, "because of his known support for equal employment opportunity for women within the GAF organization", and because he was "in a position to affect (sic) actions and procedures to implement equal employment opportunities for women."[45] Such allegations constitute a sufficient pleading of acts "in furtherance of the object of" a conspiracy to deprive women in GAF of equal employment opportunity so as to entitle Novotny to maintain an action for damages to his person or property resulting from such acts.[46]

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45. Complaint ¶¶ 24-27.

46. It has been suggested that *Cameron v. Brock,* 473 F.2d 608, 610 (6th Cir. 1973) runs counter to the position that we adopt. There the Court recognized a class composed of "supporters of political candidates" for *Griffin* purposes, and stated that "if a plaintiff can show that he was denied the protection of the law because of the class of which he was a member" an action lay under § 1985(3). We understand the Sixth Circuit to have defined a sufficient rather than a necessary condition for a § 1985(3) action. Any other declaration would, of course, have been dictum. Likewise, the comment of the Seventh Circuit in *Meiners v. Moriarity,* 563 F.2d 343, 348 (7th Cir. 1977) that plaintiff did not allege "that he belongs to the kind of class . . . that could support a claim under § 1985(3) "seems best interpreted as a definition of the type of class which can be the target of a § 1985(3) conspiracy rather than a statement about standing, particularly since that Circuit carefully reserved the issue of how close a connection between the plaintiff and the class of conspiracy victims was required under § 1985(3) in *Murphy v. Mt. Carmel H.S.,* 543 F.2d 1189, 1192 (7th Cir. 1976).

The "in furtherance of" language of the statute seems to require some degree of relationship between

(2) *Equal Privileges and Immunities and Equal Protection*

(a) *The Statutory Scheme*

Once the existence of class-based invidious animus is established, the boundaries of protection offered by § 1985(3) are traced by the scope of the words "equal protection of the laws" and "equal privileges and immunities under the laws." These are the two primary interests which the statute purports to guard.[47]

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the act done and the object of the conspiracy. We do not determine, however, how close such nexus must be to support a § 1985(3) claim.

47. It could be argued that because the phrases track the 14th Amendment's guarantees, the construction of the 14th Amendment's language should govern the guarantees of § 1985(3). *See Bellamy v. Mason's Stores Inc.*, 508 F.2d 504, 507 (4th Cir. 1974). Such a conclusion may be unwarranted. First, with respect to the privileges and immunities clause, the language of § 1985(3) is broader than that contained in the 14th Amendment. Because it shields against state abridgement the "privileges and immunities of the citizens of the United States" the 14th Amendment has been held to secure *only* the privileges and immunities of national citizenship as opposed to state citizenship. This interpretation in turn has been construed to exclude "basic" rights said to attach to state citizenship from protection of the 14th Amendment *See e.g. Madden v. Kentucky*, 309 U.S. 83, 90-91 (1940); *Hague v. CIO*, 307 U.S. 496 (1939); *Twining v. New Jersey*, 211 U.S. 78 (1908); *Hodges v. United States*, 203 U.S. 1, 15-16 (1906); *United States v. Cruikshank*, 92 U.S. 542 (1875); *Slaughterhouse Cases*, 83 U.S. [16 Wall.] 36, 72-82 (1872). *See generally United States v. Williams*, 341 U.S. 70 (1951) (opinion of Frankfurter, J.). In contrast, the language of § 1985(3) reads, "privileges and immunities under law."

As a result, since the resuscitation of § 1985(3) in *Griffin*, there has been considerable discussion by jurists and scholars as to whether the statute is "substantive" or "remedial," and if "remedial," for which rights it provides remedies.[48] While we have no occasion

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Second, while the 14th Amendment is on its face directed against state denials of equal protection and deprivations of liberty and property, the Supreme Court has established that, in accordance with its language, § 1985(3) applies to private as well as public action. *Griffin*, 403 U.S. at 96-101. As a result, canons of construction developed to delimit the reach of the 14th Amendment prohibitions may not be appropriate guides to ascertaining the range of § 1985(3).

Moreover, § 1985(3), enacted eight years after passage of the 14th Amendment, has a legislative history of its own which may well cast different light on its meaning than that surrounding the adoption of the 14th Amendment. *Cf Griffin*, 403 U.S. at 104-05 (holding that certain applications of § 1985(3) are authorized by the 13th Amendment).

48. *E.g. compare Action v. Gannon*, 450 F.2d 1227 (8th Cir. 1971) (en banc) (protecting freedom of religion); *Means v. Wilson*, 522 F.2d 838 (8th Cir. 1975) *cert. denied* 424 U.S. 958 (1976) (protecting right to vote); *Richardson v. Miller*, 446 F.2d 1247 (3d Cir. 1971) (protecting free expression) *with Cohen v. Illinois Inst. of Technology*, 524 F.2d 818 (7th Cir.) *cert. denied* 425 U.S. 943 (1976) (sex discrimination not actionable under 14th Amendment and § 1985(3)); *Bellamy v. Mason's Stores, Inc.*, 508 F.2d 504 (4th Cir. 1974) (free association not protected); *McLellan v. Mississippi Power & Light Co.*, 545 F.2d 919 (1977) (en banc) (only independently illegal acts deprive of equal protection not reaching scope of privileges and immunities). *See generally Lopez v. Arrowhead Ranches*, 523 F.2d 924 (9th Cir. 1975). *And compare e.g.* Note, *Private Conspiracies, supra* note 19 (arguing that restriction to remedying independently illegal actions is "formalistic and over-restrictive" but suggesting that statute should

to undertake to review the entire debate, certain observations frame our discussion here.

It seems that § 1985(3) is not to be read as a general charter to federal courts to set codes of conduct wherever "equality" of any class is allegedly infringed. The reluctance to trigger the development of such a "general federal tort law" formed the backdrop of the Supreme Court's discussion in *Griffin*,[49] and properly so in light of the statutory language contained in § 1985(3) as well as its legislative history.

The passage, "deprive of . . . equal protection *of the laws* or equal privileges and immunities *under the laws*,"[50] connotes the existence of laws outside of § 1985(3) which define the "protection" and "privileges and immunities" that are guaranteed against invasion.[51]

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exempt "areas of private choice that should remain autonomous"); Note, *The Supreme Court 1970 Term*, 85 Harv. L. Rev. 3, 99-101 (areas covered by § 1985(3) are "uncertain," suggesting limitation of protection to guarantees of Bill of Rights) *with* Note, *The Scope of Section 1985(3), supra* note 19 at 242-251 (arguing that § 1985(3) should be limited to providing a remedy for independent federal rights); Note, *Federal Power to Regulate, supra* note 10 at 497-98 (suggesting statute should be read as "remedial"), *see also* n.62 *infra*.

49. 403 U.S. at 102. *Cf. Paul v. Davis*, 424 U.S. 693, 701 (1976); Senator Trumbull, *Cong. Globe* 580 ("quite well satisfied" that intent of § 2 was not "to enter the States to pass a general criminal code for the State, or a general law for the redress of civil injuries").

50. 42 U.S.C. § 1985(3) (Emphasis added).

51. *Cf. McLellan v. Mississippi Power & Light Co.*, 545 F.2d 919, 924-28 (5th Cir. 1977) *(en banc)* (reaching a conclusion that the object of conspiracy must be independently illegal, on the basis of dicta in *United States v. Harris*, 106 U.S. 629 (1882)).

This connotation is confirmed by our reading of the debates surrounding the adoption of § 1985(3). Most of the proponents of the Ku Klux Klan Act explicity viewed it as protecting rights conferred by sources other than the Act itself.[52] Indeed, Senator Edmunds, the floor manager of the bill in the Senate, explicitly stated:

> All civil suits which this Act authorizes, as every lawyer understands, are not based on it, they are based on the rights of the citizen. The Act only gives a remedy.[53]

Similarily, in describing the conspiracies actionable under § 1985(3), the Supreme Court in *Griffin* said:

> The conspiracy, in other words, must aim at a deprivation of the equal enjoyment of rights *secured by law* to all.[54]

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52. *See e.g.* Senator Edmunds, *Cong. Globe*, 567 ("Constitutional rights") 568, ("Constitution and Laws of the United States") 568, 581 ("equal protection of the laws of the United States"); Representative Cook, *id.* at 485 ("where Constitution of the United States secures a right to a citizen"); Representative Shellabarger, *id.* at 382 ("laws of the United States and constitution thereof") App. 113 ("constitutional or statutory law"); Representative Hawley, *id.* at 383 *(semble); cf.* Senator Thurman, *id.* App. 218 (arguing that "laws" must be laws of the United States, since otherwise Congress has no power to punish violations"). *But cf.* Representative Shellabarger, *Cong. Globe* at App. 69 (suggesting that § 2 protects "those privileges and immunities which are in their nature fundamental and which inhere and belong of right to citizens of all free governments"); Representative Sumner, *id.* at 651 ("rights national in character").

53. *Cong Globe* at 568.

54. 403 U.S. at 102. *See id.* 103 ("animus to deprive the petitioners of equal enjoyment of legal rights"

Whatever else "equal privileges and immunities" or "equal protection" may mean, in the context here, we conclude that a deprivation of equal privileges and immunities under § 1985(3) includes the deprivation of a right secured by a federal statute guaranteeing equal employment opportunity.

This is not to say, however, that the object of the conspiracy must necessarily be independently illegal, or that the law conferring a right must by its own force secure it against private action.[55] For the statute proscribes conspiracies to deprive persons or classes of persons of legal rights "directly or indirectly." And, as Judge Learned Hand said of another section of the Ku Klux Klan Act securing federal privileges, "it would emasculate the Act either to deny protection against reprisal to those whom threats did not deter, or to leave recourse those who were later made victims of reprisals of which they had not been warned."[56]

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is requisite of a § 1985(3) claim); *id.* at 105 ("Congress may protect blacks against conspiracies depriving them of the basic rights that the law secures to all free men"). *See The Supreme Court, 1970 Term,* 85 Harv. L. Rev. 3, 99 (1971).

55. Our analysis thus diverges from that adopted by the Fifth Circuit in *McLellan v. Mississippi Power and Light Co.,* 545 F.2d 919, 924-28 (5th Cir. 1977) *(en banc).*

56. *Bomar v. Keyes,* 162 F.2d 136, 139 (2d Cir.) *cert. denied* 332 U.S. 825 (1947) (L. Hand, J. for Swan and Clark, JJ.) (holding that termination of probationary teacher in retaliation for voluntary decision to serve on a federal jury would "deprive" her of a "right or privilege secured by a law of the United States" in violation of § 1983). *See United States v. Waddell,* 112 U.S. 76 (1884) (interference with privilege to establish homestead on federal land actionable under § 241, despite the fact that statute granting privilege did not explicitly protect the homesteader against private action).

Thus § 1985(3) may not be construed as a warrant to impose wide-ranging new duties upon private individuals in the interests of abstract equality. Yet it must be remembered that the Act was broad-gauged legislation designed to provide additional remedies for actions threatening the enjoyment of important rights. As a draftsman of the Act expressed the intent:

> This Act is remedial and in aid of the preservation of human liberty and human rights. All statutes and constitutional provisions authorizing such statutes are liberally construed . . . [and] the largest latitude consistent with the words employed is uniformly given in construing such statutes. . . .[57]

(b) *Equal Protection Privileges and Immunities in this case*

Here, as noted above, the plaintiff alleged a concerted course of conduct on the part of individual defendants of "intentionally and deliberately . . . denying to female employees equal employment opportunity," in various specified respects.[58] Novotny further pleaded

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The position that rights created between the citizen and the Federal Government entail a concomitant obligation of private parties not to interfere with receipt of benefits under or the exercise of such rights was ably expounded by Professor Cox in *Foreword: Constitutional Adjudication and the Promotion of Human Rights,* 80 Harv. L. Rev. 91, 110-115 (1966).

57. Representative Shellabarger, *Cong. Globe* App. 68 (introducing Ku Klux Klan Act.)

58. Complaint ¶¶ 17-21. *See* n.1 *supra.*

that in retribution for his support of equal employment opportunities for women within the GAF organization, the individual defendants, acting in concert, caused his employment with GAF to be terminated. Taking his averments as true—as on a rule 12(b)(6) motion we must[59]—Novotny has made out a case that he has been injured by acts done in furtherance of a conspiracy proscribed by § 1985(3).

The conspiracy alleged had as its goal the denial of job equality for women, in direct violation of federal law guaranteeing this basic and important right.[60] And at least a coadunation to deprive female employees of the basic right of equal opportunity in contravention of federal law would fall squarely within the statute's prohibition of conspiracies to abridge equal privileges and immunities.[61]

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59. *See e.g. Jenkins v. McKeithen,* 395 U.S. 411, 416 (1969); *Conley v. Gibson,* 355 U.S. 41, 45-48 (1957).

60. 42 U.S.C. § 2000e-2(a)(1) makes it an unlawful employment practice for an employer to "discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment because of such individual's . . . sex."

Similarly, 43 P.S. § 955(a) under Pennsylvania law makes it unlawful for any employer "because of . . . sex . . . to discriminate against [and] individual with respect to compensation, hire, tenure, terms, conditions or privileges of employment." Moreover, the individual conduct which Novotny alleges might also violate 43 P.S. § 955(e) which prohibits "any person, whether or not an employer . . . or employee" to aid, abet, incite, compel or coerce" a violation of § 955(a).

61. As noted above, n.47 *supra,* unlike the 14th Amendment, § 1985(3) does not appear to limit its protection to the privileges and immunities of United States citizens. But the legislative history is not pellucid. *Cf.*

While the Congress in 1871 could not have specifically contemplated a federal statute that was not enacted until almost a century later, as a matter of ordinary language the words of § 1985(3) clearly embrace a statutorily provided right of equal employment opportunity within the rubric "equal privileges and immunities under the laws." As the Court said in *United*

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e.g. Representative Cook, *Cong. Globe* 486 (suggesting "force, fraud or intimidation" would violate statute); Senator Edmunds, *id.* 580 (equal protection of "state laws"); *with e.g.* Senator Thurman, *id.* App. 218 (only national laws can be enforced by Congress); Senator Sumner, *id.* 651 (rights protected should be national rights so that protection will not be "accident of local law").

In his complaint, Novotny claimed that the retaliation for his support of women abridged his First Amendment rights, in violation of § 1985(3). *Cf. Richardson v. Miller,* 446 F.2d 1247 (3d Cir. 1971).

Since we find the requisite allegations of a conspiracy to deny equal privileges and immunities in the pleading regarding sex discrimination, we need not resolve the question whether a class-based conspiracy to injure an individual for the exercise of First Amendment rights would state a cause of action under § 1985(3). *Compare Tyler v. "Ron",* No. 77-1885 (8th Cir. 18 April 1978) (interference with constitutional right would state a §1985(3) cause of action); *Action v. Gannon,* 450 F.2d 1227, 1235 (8th Cir. 1971) (en banc) (private interference with freedom of religion states a cause of action); *Westberry v. Gilman Paper Co.,* 507 F.2d 206 (5th Cir. 1975) *withdrawn as moot* 507 F.2d 216 (en banc) (firing employee for political activities made out § 1985(3) claim); *Means v. Wilson,* 522 F.2d 833 (8th Cir. 1975) (conspiracy to deny right to vote in tribal elections states a § 1985(3) claim) *cert. denied* 424 U.S. 958 (1976) *with Murphy v. Mt. Carmel H.S.,* 543 F.2d 1189 (7th Cir. 1976) (First Amendment right to free speech not protected); *Bellamy v. Mason's Stores, Inc.,* 508 F.2d 504 (4th Cir. 1974) (right of association

States v. Price,[62] regarding 18 U.S.C. § 241, the "closest remaining criminal analogue of § 1985(3)":[63]

> The language . . . is plain and unlimited. As we have discussed, its language embraces all of the rights and privileges secured to citizens by *all* of the Constitution and *all* of the laws of the United States. There is no indication in the language that the sweep of the section is confined to rights that are conferred by or "flow from" the Federal Government, as distinguished from those secured or confirmed or guaranteed by the Constitution.

Nor does the legislative history of the Ku Klux Klan Act weaken the implication of the statutory language that rights conferred by at least some federal statutes fall within the definition of "equal privileges and immunities."[64] Congressman Shellabarger, the Act's prime legislative engineer, described § 2, from which § 1985(3) is derived, as "providing for the punishment of any combination or conspiracy" impinging on basic rights protected by law.[65] And Senator Edmunds stated that § 2 mandated punishment for acts done in pursuance of "a conspiracy to deprive the citizens of the United States, in the various ways named, of the rights which the Constitution and laws of the United States made pursuant to it give them."[66]

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not protected); *McLellan v. Mississippi Power & Light Co.*, 545 F.2d 919, 925-26 n.22 (5th Cir. 1977) (en banc) (right to file bankruptcy petition not protected). *See also Cameron v. Brock,* 473 F.2d 608 (6th Cir. 1973) (conspiracy by sheriff to harass political opponents states § 1985(3) claim).

We note, however, that insofar as the reluctance to recognize a cause of action for First Amendment rights is based on a supposed want of Congressional power, such reasoning is less forceful here. It has been held that the right to speak on issues regarding the national government is a right and privilege of national citizenship protectable under the 14th Amendment and Congress' inherent powers. *Hague v. CIO,* 307 U.S. 496 (1939) (opinion of Roberts, J.); *see United States v. Cruikshank,* 92 U.S. 542, 552 (1875). *See also* n.109 *infra* (right to persuade others to comply with federal law may be privilege of national citizenship).

62. 383 U.S. 787, 800 (1966).

63. This characterization was contained in *Griffin,* 403 U.S. at 98.

Enacted a year before the Ku Klux Klan Act, § 241 makes it a federal crime to:

> conspire to injure, oppress, threaten, or intimidate any citizen in the free exercise or enjoyment of any right or privilege secured to him by the constitution or laws of the United States, or because of his having so exercised the same. . . .

64. Inasmuch as we are concerned here only with a federal statute securing a right to equal employment opportunity, which we hold to be within the ambit of § 1985(3)'s "equal privileges and immunities," we have no occasion to determine whether rights secured by all federal statutes or by state law come within § 1985(3)'s "privileges and immunities."

65. *Cong. Globe* at 382 (conspiracy to "deprive a citizen of the United States of such rights and immunities as he has by virtue of the *laws of the United States* and the Constitution thereof"). (emphasis added). *See* the remarks of Congressman Shellabarger at *id.* 517 (the goal of the Ku Klux Klan "is to trample into the dust the newly acquired political rights of the freeman and the Constitution and laws which confer them);" *id.* app. 113 (the gist of the offense under section 2 is "in the conspiracy to defeat United States Law made in protection of the fundamental rights of national citizenship, whether that law be Constitutional or statutory law").

66. *Cong. Globe* 568. *See e.g. id.* at 383 (Rep. Hawley) (law should reach those who "stand in the way of

The conclusion that rights conferred by at least some federal statutes fall within the ambit of "equal privileges and immunities under the laws," which § 1985(3) protects, is also amply supported by relevant precedent. A number of courts of appeals have determined that a deprivation of certain statutory rights gives rise to a cause of action under § 1985(3).[67] Moreover, in cases regarding statutes cognate to § 1985(3), the Supreme Court has held that "privileges and immunities" include federal statutory rights.[68]

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the exercise by this man of the rights and privileges to which he is clearly entitled under the constitution and laws of the United States"); *id.* app. 188 (Rep. Willard) (bill covers "rights, privileges and immunities of any person to which he is entitled under the Constitution and laws of the United States"). *Id.* 579 (Sen. Trumbull) (bill protects "persons in the rights which were guarantied (sic) them by the Constitution and laws of the United States. . . .") *Quoted in Monroe v. Pape,* 365 U.S. 167, 181 (1961).

67. *Marlowe v. Fisher Body,* 489 F.2d 1057 (6th Cir. 1973); *Lopez v. Arrowhead Ranches,* 523 F.2d 924 (9th Cir. 1975) (by implication); *Doski v. M. Goldseker Co.,* 539 F.2d 1326 (4th Cir. 1976) (by implication) *Taylor v. Nichols,* 558 F.2d 561, 571 (10th Cir. 1977); *Local No. 1 v. Intl. Brotherhood of Teamsters, etc.,* 419 F. Supp. 263, 275-77 (E.D. Pa. 1976); *Beamon v. Saunder & Co.,* 423 F. Supp. 1167, 1177 (E.D. Pa. 1976); *Milner v. Ntl. School of Health Tech.,* 409 F. Supp. 1389, 1395 (E.D. Pa. 1976). *Cf. Cohen v. Ill. Inst. of Technology,* 524 F.2d 818, 828 (7th Cir. 1975) *cert. denied* 425 U.S. 943 (1976) ("a federally protected right").

68. While, for the reasons noted above, n.47 *supra,* we are reluctant to reason closely from analogies to the 14th Amendment privileges and immunities clause, it is to be observed that in the *Slaughterhouse Cases,* 83 U.S. (16 Wall) 36, 79 (1883), the Court said that national privileges or immunities were those "which owe their existence to the Federal government, its national character, its Constitution, *or its laws.*" (emphasis added).

In *United States v. Johnson,*[69] the Supreme Court reviewed the application of § 241,[70] which protects the "free exercise or enjoyment of any right or privilege secured by the Constitution and laws of the United States," to a "conspiracy by outside hoodlums to assault Negroes for exercising their right to equality in public accommodations under § 201 of the Civil Rights Act."[71] The Court had little trouble in concluding that "the right to service in a restaurant is such a 'right' [under § 241] at least by virtue of the 1964 Act".[72] Similarly, almost a century earlier, in *United States v. Waddell,*[73] the Supreme Court was faced with a combination to drive a homesteader off federal land upon which he was attempting to establish a claim pursuant to statutory procedures. Such acts "to prevent or throw obstruction in the way of exercising such statutory rights" were held to constitute a conspiracy to impair federal rights which could be attacked under § 241.

Similar light is cast by the interpretation of § 1983, formerly § 1 of the Ku Klux Klan Act of 1871.[74] In *City of Greenwood v. Peacock,* the Supreme Court stated that under § 1983 "officers may be made to respond in damages . . . for violations of rights conferred by federal equal civil rights laws (sic)," and a number of Circuits

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69. 390 U.S. 563 (1968).

70. See note 63 *supra.*

71. 390 U.S. at 564.

72. *Id.* at 565-66.

73. 112 U.S. 76 (1884).

74. The legislative history reveals that the Congress was also cognizant of the relationship between the scope of § 1985(3) and § 241. Representative Willard, *Cong. Globe* 189 app.; Representative Shellabarger, *id.* 68 app.

have acknowledged that suits for such statutory violations are proper.[75]

Having held that at least some federal statutory rights can form the predicate for a suit under § 1985(3), Novotny, in alleging the existence of a conspiracy to violate the equal employment rights of female employees in contravention of Title VII, has adequately pleaded the existence of conspiracy to deprive a class of persons of equal privileges or immunities under the laws.

(c) *Conflict with Title VII*

The defendants suggest that even if § 1985(3) provides a remedy for conspiracies to impair statutorily-conferred rights as a general matter, a § 1985(3) action to redress conspiracies to violate Title VII rights would be inconsistent with the administrative mechanism es-

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75. 384 U.S. 808, 829. *See, e.g. Chase v. McMasters,* No. 77-1317 (8th Cir. April 5, 1978); *Sanders v. Conine,* 506 F.2d 530 (10th Cir. 1974); *Blue v. Craig,* 505 F.2d 830 (4th Cir. 1974); *Gomez v. Florida State Employment Service,* 417 F.2d 569 (5th Cir. 1969); *Bomar v. Keyes,* 162 F.2d 136 (2d Cir.), *cert. denied,* 332 U.S. 825 (1947) (L. Hand, J.); *LaRaza Unida v. Volpe,* 440 F. Supp. 904 (N.D. Cal. 1977). *Cf. e.g. Eisen v. Eastman,* 421 F.2d 560 (2d Cir. 1969) *overruled Lynch v. Household Finance Corp.,* 405 U.S. 538, 542 (1975) (§ 1983 does not protect property rights); *Andrews v. Maher,* 525 F.2d 113 (2d Cir. 1975) (no jurisdiction under 28 U.S.C. § 1343(3) to hear § 1983 challenge to deprivation based on welfare statute). *Randall v. Goldmark,* 495 F.2d 356 (1st Cir.), *cert. denied* 419 U.S. 879 (1974) *(semble).*

The conclusion that § 1983 and § 1985(3) may both provide causes of action for deprivation of statutory rights is not undercut by the reasoning of *Gonzalez v. Young,* 560 F.2d 160 (3d Cir. 1977), *cert. granted* 46 U.S.L.W. 3526, Feb. 21, 1978.

tablished by the latter Act. In support of this proposition, they cite the Fourth Circuit's holding in *Doski v. Goldseker.*[76]

In *Doski,* a female employee brought suit alleging sex discrimination violative of both Title VII and § 1985(3). The court held the Title VII remedy to be the exclusive means of vindicating statutory rights, since the availability of § 1985(3) would allow a plaintiff to bypass the administrative procedures provided by Title VII. *Doski* read those parts of the legislative history of Title VII approving overlap between Title VII and other Civil Rights Act remedies to refer only to vindication of "federal rights [which existed] prior to the enactment of Title VII."[77]

At least one court of appeals has apparently reached a conclusion contrary to that of the Fourth Circuit. In *Marlowe v. Fischer Body,*[78] the Sixth Circuit reversed the dismissal of a complaint which alleged employment discrimination based on religion and national origin. Although the complaint contained counts based on Title VII and the NLRA, in addition to § 1985(3), the Sixth Circuit reversed the dismissal on all counts.[79]

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76. 539 F.2d 1326 (4th Cir. 1976). *Cf. Schatte v. International Alliance,* 182 F.2d 158 (9th Cir. 1950) (no § 1983 suit for rights protected by NLRA; NLRA remedies held exclusive).

77. 539 F.2d at 1334.

78. 489 F.2d 1057 (6th Cir. 1973).

79. *See Milner v. Natl. School of Health Tech.,* 409 F. Supp. 1389 (E.D. Pa. 1976) (recognizing claim for sex discrimination violating Title VII under § 1985(3)). *Cf. Weise v. Syracuse University,* 522 F.2d 397, 408-409 n.16 (2d Cir. 1975) (reserving issue of possible conflict between Title VII and § 1985(3)).

We find the result reached in *Marlowe* to be better grounded in history and precedent than that in *Doski*. On its face, § 1985(3) makes no distinction among federal privileges and immunities depending on the date of the enactment of laws securing them. As noted above, the language seems to protect *all* such privileges and immunities. Indeed, in describing the bill, Senator Edmunds stated that it reached "conspiracies to deprive people of the equal protection of the laws, *whatever those laws may be.*"[80]

Thus, if rights protected by Title VII are to be excluded from the scope of § 1985(3), such result must flow from the fact that Title VII worked a partial repeal of § 1985(3), although § 1985(3) was not mentioned by the later legislation. Such repeals by implication are, of course, not favored. In *Runyon v. McCrary,*[81] the Supreme Court recently reiterated, in reference to § 1981, the rule that implied repeals occur only if the two legislative acts in question are in irreconcilable conflict.[82] Given the legislative history of Title VII and its construction by the Supreme Court, we discern no such conflict here.

As the Supreme Court observed in *Alexander v. Gardner-Denver Co.,*[83] the Senate defeated an amendment which would have made Title VII the exclusive federal remedy for most unlawful employment practices,

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80. *Cong. Globe* 568.

81. 427 U.S. 160, 173 n.10 (1976).

82. *Cf. Sullivan v. Little Hunting Park,* 396 U.S. 229, 237 (1969) (§ 1982 is not repealed by 1964 Civil Rights Act, because the later Act is "not at war" with the principles embodied in § 1982).

83. 415 U.S. 36, 48 and n.9 (1974).

and a similar amendment was rejected in connection with the Equal Employment Opportunity Act of 1972. Indeed, the Supreme Court noted in *Runyon*[84] that Senator Williams, floor manager of the 1972 Act, argued in opposition to the amendment that "it is not our purpose to repeal existing civil rights laws," and specifically stated that:

> The law against employment discrimination did not begin with Title VII and the EEOC, nor is it intended to end with it . . . the courts have specifically held that Title VII and the Civil Rights Acts of 1866 and 1871 are not mutually exclusive, and must be read together to provide alternative means to redress individual grievances.[85]

Such statements are not isolated remarks. After reviewing the legislative history of Title VII, the Supreme Court in *Johnson v. REA* concluded:

> Despite Title VII's range and its design as a comprehensive solution for the problem of invidious discrimination in employment, the aggrieved individual is clearly not deprived of other remedies he possesses and is not limited to Title VII in his search for relief.[86]

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84. 427 U.S. at 174 n.11.

85. 118 Cong. Rec. 3371 (1972).

86. 421 U.S. 454, 459 (1975). *See Alexander v. Gardner-Denver Co.,* 415 U.S. 36, 48 (1974). *Johnson* also explicitly considered and rejected the contention that litigants under § 1981 should be required to follow Title VII's administrative procedures before being permitted to litigate. 421 U.S. at 461.

The argument that § 1985(3) actions founded on Title VII rights need not defer to the procedures specifically provided for the vindication of Title VII rights is

In view of this holding, and of the generally favorable reception which the Supreme Court has extended to Reconstruction Act litigation dealing with subjects also covered by later civil rights enactments,[87] we conclude that Novotny's claim under § 1985(3) is not precluded by Title VII.

C. *The Constitutionality of § 1985(3)*

(1) *The Scope of the Inquiry*

The defendants assert that if § 1985(3) purports to reach confederations such as the one alleged by Novotny, the statute is beyond the powers conferred upon Congress, and therefore unconstitutional. Before examining this contention, the question of the statute's constitutionality must be set in perspective.

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somewhat weaker than that for the independence of § 1981. Unlike § 1981, § 1985(3) is not specifically mentioned in the debates on Title VII, and § 1985(3) is more intimately linked to Title VII. On the other hand, in this case, the EEOC, which is entitled to some deference in such matters, *see e.g. Zuber v. Allen,* 396 U.S. 168, 192-94 (1969); *Udall v. Tallman,* 380 U.S. 1, 16 (1965) has argued for the availability of a § 1985(3) action to vindicate Title VII rights.

In any event, since the plaintiff here properly exhausted his remedies under Title VII, we need not resolve the issue.

87. *See Sullivan v. Little Hunting Park,* 396 U.S. 229, 237 (1969) (§ 1982 and Fair Housing Act); *United States v. Johnson,* 390 U.S. 563 (1968) (§ 241 and 1964 Public Accommodations Act); *cf. Adickes v. S. H. Kress & Co.,* 398 U.S. 144, 150 n.5 (1970) (No § 1983 recovery for violation of Public Accommodations Act, in view of manifest Congressional intent that damage actions not be permitted. A 14th Amendment action under § 1983, however, is not inconsistent with Public Accommodations Act).

In the first case in which the Supreme Court faced a challenge to the constitutionality of the Ku Klux Klan Act of 1871, the Court set forth its analysis in these terms:

> Proper respect for a coordinate branch of the government requires the courts of the United States to give effect to the presumption that Congress will pass no Act not within its constitutional power. This presumption should prevail unless the lack of constitutional authority to pass an Act is clearly demonstrated.[88]

Ninety years later, in construing § 1985(3), the Court in *Griffin* was again met with the allegation that Congress had exceeded its powers in the 1871 Act. It determined the question in the negative, measuring the Act against the following standard:

> Our inquiry . . . need go only to identifying a source of congressional power to reach the private conspiracy alleged by the complaint in this case.[89]

Griffin gave no indication that Congress must specifically invoke a particular Constitutional authorization to allow the Court to sustain an enactment. Instead, since the presumption is in favor of constitutionality,

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88. *United States v. Harris,* 106 U.S. 629, 635-36 (1883). The Court went on to quote with approval the comment of Mr. Justice Story:

> Whenever, therefore, a question arises concerning the constitutionality of a particular power, the first question is whether the power be expressed in the Constitution. If it be, the question is decided. If it be not expressed, the next inquiry must be whether it is properly an incident to an express power and necessary to its execution. *Id.* at 636.

89. *Griffin,* 403 U.S. at 104.

the government need only point to an applicable fount of congressional authority.[90]

Discussion must, therefore, be directed toward ascertaining whether a source of Congressional power exists which will justify giving relief to Novotny.

(2) *The Power of Congress*

There is little question that the Congress which passed the 1871 Act believed itself to be acting under the Fourteenth Amendment. The legislation itself was formally entitled "An Act to Enforce the Provisions of the Fourteenth Amendment to the United States Constitution and For Other Purposes." In defending the proposal against charges of unconstitutionality, proponents of the Act found warrant in the text of the Fourteenth Amendment.

The Supreme Court recently noted in *Monell v. N.Y.C. Dept. of Social Services,*[91] that Representative Shellabarger opened his remarks introducing the Act by asserting that the Fourteenth Amendment's twin guarantees of "equal protection" and the "privileges and immunities of citizenship" should be read to protect equality in the enjoyment of life, liberty, and property. He then invoked what he regarded as a settled principle of law that "Congress has always as-

90. *See e.g. District of Columbia v. Carter,* 409 U.S. 418, 424-25 (1973) (extension of § 1983 to guard against deprivation under color of territorial law presumed to be an exercise of Article IV power to regulate territories); *Examining Board v. Flores de Otero,* 426 U.S. 572, 582-83 (1976) (*semble*).

91. 46 U.S.L.W. 4753-54 (1978).

sumed to enforce, as against the states and also persons, every one of the provisions of the Constitution."[92]

It was not without a certain sense of poetic justice that Representative Shellabarger adduced support for this proposition. For the cases sustaining the fugitive slave laws enacted by Congress prior to the Civil War, beginning with *Prigg v. Pennsylvania,* rested their holdings on the proposition that the Fugitive Slave clause of the Constitution,[93] though on its face addressed to "laws and regulations" of states, empowered the federal government to adopt legislation binding on individuals.[94] Shellabarger declared that it could not "now be endured" that

> those decisions which were invoked and sustained in favor of bondage shall be stricken down when first called upon and invoked in behalf of human rights and American citizenship.[95]

92. *Id.*

93. *Prigg v. Pennsylvania,* 41 U.S. (16 Pet.) 539 (1842); *see e.g. Ableman v. Booth,* 62 U.S. (21 How.) 506 (1859). *See generally* R. Cover, Justice Accused; Antislavery and the Judicial Process 159-191 (1975).

94. Art. IV § 2 cl. 3:

> No Person held to Service or Labour in one State, under the laws thereof, escaping into another, shall, in Consequence of any Law or Regulation therein, be discharged from such Service or Labour, but shall be delivered up on Claim of the Party to whom such Service or Labour may be due.

95. *Cong. Globe* App. 70. The refrain was taken up by others in both the House and Senate: *e.g.* Representative Sumner, *Cong. Globe* 651 ("As in other days Slavery gave its Character to the Constitution, filling it with its own denial of Equal Rights and Compelling the National government to be its instrument, so now do I in-

Although it appears that at the time he propounded it, Shellabarger's argument was supported by the weight of legal precedent,[96] subsequent litigation demonstrated the Supreme Court's reluctance to apply the principle of *Prigg* to legislation enacted in reliance on the Fourteenth Amendment. Without dealing squarely with the

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sist that Liberty must give its Character to the Constitution.")

Representative Platt (App. 183-184) ("I presume this power will not be questioned by gentlemen on the other side representing the Democratic Party . . . . They found enough power in the Constitution to compel every man in every state in the Union to assist in enforcing the United States laws . . . compelling them by United States law and in defiance of State Laws to assist in returning fugitives to slavery. . . ."). Senator Lowe, 375 ("If such was the law announced by the tribunal of the last resort in reference to the rendition of fugitive slaves, shall a less liberal construction be allowed in reference to a similar constitutional provision in favor of civil rights and personal security?"). *See* generally, *Avins, supra* note 33.

96. This conclusion was arrived at by commentators as divergent as Laurent Frantz, *Congressional Power to Enforce the Fourteenth Amendment Against Private Acts,* 73 Yale L.J. 1353, 1357 (1964) and Prof. Raoul Berger, Government By Judiciary, The Transformation of The Fourteenth Amendment 225-27 (1977). But cf. Bickel, *The Original Understanding and the Segregation Decision,* 69 Harv. 1, 60 and n.115 (suggesting that, despite statements to the contrary by the draftsman of the 14th Amendment, the legislative history indicates that Congress was not to have the latitude provided in the Necessary and Proper clause); Note, *Theories of Federalism & Civil Rights,* 75 Yale L.J. 1007, 1045-46 and n.200 (1966) (suggestion that § 5 is narrower than the Necessary and Proper clause, and therefore *Prigg* may be distinguished).

fugitive slave law cases,[97] the Supreme Court erected a barrier preventing the application of legislation implementing the Fourteenth Amendment to activities not infused with "state action."[98]

The last two decades have brought a substantial erosion of that barrier.[99] And in *United States v. Guest* a majority of the Court expressed the opinion that

> the specific language of § 5 [of the 14th Amendment] empowers the Congress to enact laws punishing all conspiracies—with or without state action

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97. It is unclear whether the Court was faced with the fugitive slave cases in *Harris* or *Cruikshank,* but the *Prigg* case was argued to the Court in the *Civil Rights Cases,* 109 U.S. 3, 7 (1883); and Justice Harlan made considerable use of it in his dissent, *id.* 28-35, 50-54. The majority, however, declined to mention *Prigg* and its progeny.

98. *E.g. United States v. Cruikshank,* 92 U.S. 542 (1876); *United States v. Harris,* 106 U.S. 629 (1883); *Civil Rights Cases,* 109 U.S. 3 (1883); *see generally, Commonwealth of Pennsylvania v. Local Union No. 542,* 347 F. Supp. 268, 291-94 (E.D. Pa. 1972) (Higginbotham, J.) and sources cited therein; Note, *Federal Power to Regulate, supra* note 10 at 452-460.

99. *See e.g. District of Columbia v. Carter,* 409 U.S. 418, 424 n.8 (1973); *United States v. Guest,* n.100 *infra. United States v. Price,* 383 U.S. 787, 797-807 (1966); *Heart of Atlanta Motel, Inc. v. United States,* 379 U.S. 241, 279-286 (1964) (opinion of Douglas, J. concurring) *id.* 291-93 (opinion of Goldberg, J. concurring); *Action v. Gannon,* 450 F.2d 1227, 1233-37 (8th Cir. 1971) (en banc) (and materials cited therein); *Commonwealth of Pennsylvania v. Local Union No. 542,* 347 F. Supp. 268, 294-97 (E.D. Pa. 1972) (Higginbotham, J.) (and materials cited therein); *see generally Cox, supra* note 57 at 108-120.

—that interfere with Fourteenth Amendment rights.[100]

In *Griffin,* however, the Supreme Court declined to rely on the Fourteenth Amendment in upholding the power of Congress to enact § 1985(3), and no Supreme Court case has attempted to chart the limits of § 5 since that time. Inasmuch as we need not rest on the Fourteenth Amendment to justify the application of § 1985 (3) to this case, it is not necessary at this time to resolve the scope of its Fourteenth Amendment foundation.[101]

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100. 383 U.S. 745, 762 (1966) (opinion of Clark, J., joined by Black and Fortas, JJ.); *id.* at 782 (opinion of Brennan, J. joined by Warren, Ch. J. and Douglas, J.). *See e.g. Cox, supra* note 57 at 108-20; Note, *Theories of Federalism, supra* note 96, at 1043-49 (1966).

101. Defendant asserts that the opinions of Judge (now Justice) Stevens; for the Seventh Circuit in *Dombrowski v. Dowling,* 459 F.2d 190 (7th Cir. 1972) and *Cohen v. Ill. Ins. Tech.,* 524 F.2d 818 (7th Cir. 1975) *cert. denied* 425 U.S. 943 (1926), are adverse to the assertion of the 14th Amendment as a basis for § 1985(3) as it applies to private action.

As we read those cases, however, they adopt the position that § 1985(3) "requires consideration of the state action issue in cases bottomed on an alleged violation of the Fourteenth Amendment," 524 F.2d at 829. That is, when the plaintiff asserts that the "right or privilege" or "protection of the law" (see part II(B)(2)(a) *supra*) impinged upon is the right to equal protection guaranteed by the bare terms of § 1 of the 14th Amendment, state involvement must be present because § 1 *ex proprio vigore* is addressed to the states. Such a statutory construction, even if accepted, however, does not resolve the question or whether the enforcement clause of the 14th Amendment authorizes the application of § 1985(3) to invidious discrimination on the part of private individuals which deprives persons of rights or privileges secured by state or federal laws or constitutional provisions other than the 14th Amendment. *Cf.* cases cited n.62 *supra.*

The plaintiff alleges a conspiracy to deprive women employed by GAF of their equal employment rights in violation of Title VII. We do not understand the defendants to challenge the power of Congress to prohibit employment discrimination by employers like GAF. Nor could such a challenge be plausibly made, for prohibition of such discrimination falls clearly within the range of Congressional authority under the commerce clause.[102] The same authority which warrants the provision of such rights in the first place equally empowers Congress to provide sanctions against conspiracies to interfere with the equal enjoyment of rights under Title VII.[103]

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102. *See e.g. Daniel v. Paul,* 395 U.S. 298 (1969); (Title II of 1964 Civil Rights Act is sustainable under Commerce Power); *Heart of Atlanta Motel, Inc. v. United States,* 379 U.S. 241 (1964) (*semble*); *Katzenbach v. McClung,* 379 U.S. 294 (1964) (*semble*); *Wickard v. Filburn,* 317 U.S. 111 (1942) (upholding farm quota legislation under Commerce Power); *NLRB v. Fainblatt,* 306 U.S. 601 (1939) (upholding NLRA under Commerce Power); *United States v. Darby,* 312 U.S. 100 (1941) (upholding Fair Labor Standards Act under Commerce Power).

Title VII 42 U.S.C. 2000e et seq. applies to "persons engaged in an industry affecting commerce." § 2000(e)(b). And Section 701(b) of the 1964 Civil Rights Act states Congress' conclusion that Title VII is necessary to remove obstructions to the free flow of interstate and foreign commerce.

103. Indeed the original proponents of the Ku Klux Klan Act did not base their claim of power entirely on the Fourteenth Amendment. *See e.g.* Remarks of Rep. Shellabarger, *Cong. Globe* 477-78 (referring to amendment to § 2 "so far as it is not confined to infractions of rights which are clearly independent of the Fourteenth Amendment, referable to and sustained by the old provisions of the Constitution"); Remarks of Rep. Bingham, *id.* at App. 81 ("It was always competent for the Congress of the United States by law to enforce every affirmative grant of power. . . .").

Thus, as observed earlier, in 1885 the Court in *United States v. Waddell,*[104] upheld a prosecution under § 1985 (3)'s criminal counterpart, 18 U.S.C. § 241,[105] for a conspiracy to harass and attack a homesteader exercising rights conferred by Congress through legislation authorized by Article IV Section 3.[106] In rejecting the argument that the legislation was unconstitutional, the Court said:

> Whenever the acts complained of are of a character to prevent [exercise of a statutory right] or to throw obstruction in the way of exercising this right and for the purpose and with intent to prevent it . . . because it is a right asserted under the law of the United States and granted by that law, those acts come within the purview of the statute and of the constitutional power of Congress to make such a statute.[107]

Eighty years later in *United States v. Johnson,*[108] also discussed above, the Supreme Court reversed the dismissal of an indictment under § 241 of "hoodlums" who conspired to assail black persons for exercising their right to equality of public accommodations under the 1964 Civil Rights Act. In the interim, the Supreme Court decided no case casting doubt on the constitutional power of Congress to provide sanctions for the interference by private parties with rights conferred by

104. 112 U.S. 76 (1884).
105. *Supra* note 63.
106. 112 U.S. at 79.
107. *Id.* at 80.
108. 390 U.S. 563 (1968).

a validly enacted federal statute, and we are aware of no recent decisions doing so.[109]

We therefore conclude that § 1985(3) may protect a plaintiff injured by acts done in furtherance of a conspiracy to violate the rights of female employees under Title VII without exceeding Congress' powers under the commerce clause.[110]

109. Between 1884 and 1968 prosecutions under § 241 were sustained in vindication of the right to vote, *United States v. Classic,* 313 U.S. 299 (1941); the right to travel, *United States v. Guest,* 383 U.S. 745 (1966); the right to be free of violence while in the custody of a federal marshal, *Logan v. United States,* 144 U.S. 263 (1892); the right to have one's vote counted, *United States v. Mosely,* 238 U.S. 383 (1915).

It should also be noted that litigation under § 241 establishes that the right of a citizen of the United States to inform the government of violation of federal laws can constitutionally be protected by federal legislation. *Motes v. United States,* 178 U.S. 458, 462 (1900) ("It was the right and privilege of Thompson [who was shot by the defendants] in return for the protection he enjoyed under the Constitution and laws of the United States to aid in the execution of the laws of his country by giving information to the proper authorities of violations of those laws. That right and privilege may properly be said to be secured by the Constitution and laws of the United States) *see In re Quarles,* 158 U.S. 532 (1895). The same principle may also extend to protect the right to attempt to persuade others to comply with the laws of the United States.

110. It has also been suggested that Congress may reach private discrimination against women under its Thirteenth Amendment enforcement power. Note, *Federal Power to Reach Private Discrimination, supra* note 10 at 505. *Cf. McDonald v. Santa Fe Rail Transp. Co.,* 427 U.S. 273, 285-296 (42 U.S.C. § 1981, enacted under the 13th Amendment protects whites against racial discrimination); *Graham v. Richardson,* 403 U.S. 365, 377 (1971) (aliens protected by § 1981).

D. *Conspiracy*

The final salvo launched by the defendants against Novotny's § 1985(3) count, and the one that succeeded in the district court, finds its basis in the theory that the defendants are immune to suits under § 1985(3) because the alleged combination occurred among officers and directors of a single corporation.

Defendants do not appear to challenge the fact that, while not artfully pleaded, the complaint adequately sets forth the claim that Novotny was victimized by a conspiracy.[111] Rather, the defendants maintain that their alleged concerted action was taken in their official capacities as officers and directors of GAF,[112] and therefore cannot legally be deemed a combination within the terms of § 1985(3).

Since the application of § 1985(3) to this case finds ample support in the commerce clause, however, we need not reach this argument.

111. The complaint alleges that the individual defendants "embarked upon and pursued a course of conduct the effect of which was to deny" equal employment rights, ¶ 16, and that the "course of conduct constitutes an ongoing discrimination." ¶ 18 Novotny further alleged that he was injured "as a result of the conspiracy by the individual defendants," and sets forth the manner in which the joint action of the defendants allegedly injured him. ¶¶ 30, 31, 32. Such a complaint adequately alleges a conspiracy for purposes of a Rule 12b(6) motion. *See Weise v. Syracuse University,* 522 F.2d 397, 408 (2d Cir. 1975) ("Sketchy" conspiracy allegations are sufficient where "action by the defendants collectively, in concert, and with invidious intent" is alleged); *Marlowe v. Fisher Body,* 489 F.2d 1057 (6th Cir. 1973) (allegation of "collusion" adequately raises issue of conspiracy).

112. Novotny indeed pleads that the individual defendants acted on behalf of GAF. Complaint: 33.

This contention finds no support in the language of § 1985(3). On its face, the statute requires simply that "two or more persons" conspire in order to come within its proscription.[113] Similarly, we can discern no basis for the defendants' argument in the legislative history of § 1985(3).

Nor does defendants' suggestion have solid roots in the general tenets of conspiracy theory. It is true that a conspiracy requires a plurality of legal personalities as one of its elements. For example, at common law a husband and wife could not conspire, since they constituted a single personality in the eyes of the law.[114] But it is well-settled that an employer can conspire with his employee,[115] and the Supreme Court has held that a labor union can conspire with its business agent.[116] The assertion of the defendants must therefore be that incorporation confers on corporate employees an immunity from liability under § 1985(3).

We see nothing in the policies undergirding § 1985(3) that would support such an argument. If, as seems clear under § 1985(3), the agreement of three partners to use their business to harass any blacks who register to vote constitutes an actionable conspiracy, we can per-

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113. And the Supreme Court noted in *Griffin* that "The approval of this Court to other Reconstruction Civil Rights statutes has been to accord [them] a sweep as broad as their language." 103 U.S. at 97.

114. 1 Hawkins, Pleas of the Crown 351 (6th Ed. 1788). *Cf. United States v. Dodge,* 364 U.S. 51 (1960) (repudiating this principle).

115. *See e.g. Hyde v. United States,* 225 U.S. 347, 367-68 (1912).

116. *See Duplex Printing Press Co. v. Deering,* 254 U.S. 443, 465 (1921).

ceive no function to be served by immunizing such action once a business is incorporated.

The defendants place primary reliance on the legal precept that a corporation cannot conspire with its officers because a person cannot conspire with himself.[117] Under this precept, they argue, no conspiracy exists in this case because the defendants were all officers and directors of a single corporation, and the actions injuring Novotny were taken in the course of their duties as such.

As we read Novotny's complaint, however, it does not allege that the corporate entity, GAF, conspired with its officers and directors to his detriment. In defining his cause of action under § 1985(3), Novotny alleges that his termination was accomplished "by the individual defendants in violation of" § 1985(3).[118] There is thus no occasion to evaluate the force of the proposition that a corporation cannot conspire with itself. Rather, the sole issue before us, so far as the conspiracy element is concerned, is whether concerted action by officers and employees of a corporation, with the

117. The fountainhead of this precept is *Nelson Radio & Supply Co. v. Motorola Inc.*, 200 F.2d 911, 914-15 (5th Cir. 1952). In *Nelson*, an antitrust action, the plaintiffs alleged a conspiracy between the defendant corporation and its employees, but named only the corporation as a defendant. The Fifth Circuit dismissed the suit.

In *Johnston v. Baker*, 445 F.2d 424 (3d Cir. 1971), a panel of this Court characterized our earlier approval of *Nelson* in *Goldlawr, Inc. v. Shubert*, 276 F.2d 614 (3d Cir. 1960) as *dictum* and declined "to pass on the viability of" the *Nelson* doctrine.

118. ¶ 28. Similarly, ¶¶ 30, 31 and 32 refer to a conspiracy "by the individual defendants."

object of violating a federal statute, can be the basis of a § 1985(3) complaint.

In *Mininsohn v. United States*,[119] Jacob and Max Mininsohn, the officers of Interstate Lumber Company, a corporation, caused the company to deliver underweight bags of cement to a government construction project. Jacob Mininsohn and Interstate were charged with violation of legislation prohibiting conspiracies to defraud the United States Government. On appeal, it was alleged that the evidence was insufficient to convict Jacob Mininsohn. Judge Biggs had no difficulty in concluding that "the acts of the appellant and his brother were such as indicated the existence of a conspiracy to defraud the United States."[120] This determination is in accord with a well-established line of precedent holding that, at least outside of the area of antitrust law,[121]

119. 101 F.2d 477 (3d Cir. 1939).

120. *Id.* at 478. The only point deemed worthy of legal analysis was whether the corporation could be found guilty of conspiracy. Judge Biggs concluded that such a conviction was in accord with "well settled law." *Id.*

121. A distinct line of precedent has developed regarding "conspiracies or combinations in restraint of trade" violating the Sherman Antitrust Act, 15 U.S.C. § 1, and the conditions under which a corporation can be considered to have combined or conspired with its officers or subsidiaries. *See Columbia Metal Culvert Co. v. Kaiser Aluminum & Chemical Corp.*, No. 77-1846 (3d Cir. 1978) slip op. at 21-22, n.49 and cases and sources cited therein.

The considerations which shape this antitrust doctrine, rooted in the tension between the policy of preserving and fostering competition and the interest in not intermeddling unnecessarily in the internal entrepreneurial decisions of companies, do not lie paraliel to the

where a corporation commits a substantive crime, the officers and directors who cause it to so act may be guilty of criminal conspiracy.[122]

Similarly, the sole Supreme Court decision to shed direct light on the issue before us undercuts the defendants' position. In *Pennsylvania RR. System & Allied Lines Fed. No. 90 v. Pennsylvania RR. Co.*[123] a labor union brought suit against an employer and its officers, claiming that under the predecessor to 18 U.S.C. § 241, the actions of the corporation and officers in resisting

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balance of concerns embodied in § 1985(3). For example, while almost any decision by a corporation may have an effect on competitors, and thereby come within the potential purview of the antitrust law, *cf. Chicago Board of Trade v. United States,* 246 U.S. 231, 238 (1918), only a limited number of decisions will impact on "equal protection" and "equal privileges and immunities." Conversely, while courts have interpreted economic efficiencies and pro-competitive effects to constitute justifications for certain restraints of trade we discern no indication that similar defenses would protect a conjuration to deprive a minority of equal rights.

122. *See Egan v. United States,* 137 F.2d 369 (8th Cir.) *cert. denied* 320 U.S. 788 (1943) (conspiracy to make illegal political contribution) *Barron v. United States,* 5 F.2d 799, 799-801 (1st Cir. 1925) (conspiracy to conceal assets of bankrupt corporation); *United States v. Kemmel,* 160 F. Supp. 718, 720-21 (E.D. Pa. 1958) (conspiracy to defraud the United States; collecting cases); W. LaFave & A. Scott, Handbook on Criminal Law 491 (1972); Sullivan, Antitrust Law 324 (1977); *Developments in the Law—Criminal Conspiracy,* 72 Harv. 920, 952-53 (1959) (approving this line of cases. In the case of conspiracy among corporate officers, "conditions which constitute the essence of conspiracy rationales are present to the same extent as if the same persons combined their resources without incorporation").

123. 267 U.S. 203 (1925).

the recommendations of an arbitration board under the Railway Labor Act constituted a conspiracy to "injure, oppress, threaten or intimidate any person in the enjoyment of" a federal right or privilege. The Supreme Court's opinion expressed no doubts regarding the viability of a conspiracy composed of corporate officers. Rather it stated that "The whole issue . . . is whether the provisions of Title III, in pointing out what Congress wished the parties to the dispute to do, was intended by Congress to be a positive, obligatory law. . . ."[124]

Thus, since neither considerations of policy nor force of precedent require adherence to the defendants' stance, we do not follow the line of cases adopting the rule that concerted action among corporate officers and directors cannot constitute a conspiracy under § 1985(3).[125]

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124. 267 U.S., at 210.

125. *See Herrmann v. Moore,* No. 77-6184 (2d Cir. May 10, 1978); *Girard v. 94th St. & Fifth Ave. Corp.,* 530 F.2d 66 (2d Cir.) *cert. denied* 425 U.S. 974 (1976); *Bellamy v. Mason's Stores, Inc.,* 508 F.2d 504 (4th Cir. 1974) (concurring opinion); *McLellan v. Mississippi Power & Light,* 545 F.2d 919 (5th Cir. 1977) dissenting opinion; *Baker v. Stuart Broadcasting Co.,* 505 F.2d 181, 183 (8th Cir. 1974); *Dombrowski v. Dowling,* 459 F.2d 190 (7th Cir. 1972) (Stevens, J.). We note that both *Dombrowski* and *Baker* limited their holdings to situations involving "a single act of discrimination by a single business entity." *Cf. Cohen v. Ill. Inst. of Technology,* 524 F.2d 818 (7th Cir. 1975) *cert. denied* 425 U.S. 943 (1976) (Stevens, J.) (pretermitting question of whether an institutional policy would make out a conspiracy); *Rackin v. Univ. of Pennsylvania,* 386 F. Supp. 992 (E.D. Pa. 1974) (allegation of ongoing policy of harassment and discrimination made *Dombrowski* inapposite). Thus, even under *Baker* and *Dombrowski* a finding of conspiracy is not excluded in the case before us, since Novotny alleges an eight year program of denial of equal opportunity.

III. Title VII

As an alternative to seeking relief under § 1985(3), Novotny sets forth a claim under § 704(a) of Title VII.[126] That section provides:

> It shall be an unlawful employment practice for an employer to discriminate against any of his employees . . . because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding or hearing under this subchapter.

Plaintiff maintains that his discharge because of expressed hostility toward the denial of equal employment opportunity to women in GAF, and his refusal to support the company in its allegedly discriminatory dealings with Batis constitutes a discrimination against him "because he has opposed [a] practice made an unlawful employment practice," in violation of § 704(a).

Defendants argue, however, that in order to constitute protected opposition within the meaning of the

126. 42 U.S.C. 2000e-3(a). It may be that, in this case, the cause of action under § 1985(3) contains the same elements as a Title VII claim. However, depending on particular factual settings, claims under the two statutes arising out of the same act might involve varying measures of damages, different statutes of limitations, or other variations. Moreover, § 1985(3) would protect against actions taken to coerce nonemployees (*e.g.* customers) to the detriment of Title VII rights (*e.g.* of a customer's employees), where as Title VII gives no such shield. Since, however, the extent of the over-lap between Title VII and § 1985(3) was not briefed or explored at oral argument, we do not address the matter further.

statute, an employee's antipathy to an unlawful employment practice must be manifested through involvement with formal charges or litigation under Title VII. The construction advocated by the defendants was adopted by the district court in the course of its order dismissing the complaint.

Such an interpretation, however, does not emerge from the text of the statute. On its face, § 704(a) refers to two distinct situations: first, those in which an employee has "opposed" any unlawful employment practice, and second, those in which he or she has "made a charge, testified, assisted, or participated in any manner in an investigation, proceeding or hearing" under Title VII.[127] The clauses referring to the two scenarios are connected by a disjunctive "or," and to construe the statute as the defendants suggest would render the first clause mere surplusage.

Nonetheless, the defendants claim that the legislative history negates what appears to be the clear meaning of the section. In summarizing the import of § 704(a), the Committee Reports in both House and Senate referred only to discrimination in retaliation for participation in Title VII proceedings.[128] We find such legislative history inconclusive on this point. While it does not support the contention that the first clause of § 704(a) protects activities which the second does not,

127. *See Hicks v. Abt Associates, Inc.*, 572 F.2d 960, 968-69 (3d Cir. 1978) (distinguishing "opposition" and "participation" clauses).

128. H. Rep. No. 914, 88th Cong. 2d Sess. pt. 7 at 27-28 *reprinted* 1964 U.S. Code Cong. & Ad. News 2391, 2403 (referring to identically worded provision in House Bill); S. Rep. No. 867, 88th Cong. 1st Sess. 17 (1964) (referring to § 4(c) of S. Bill 1937).

neither does it affirmatively state that such was not the intent of Congress.

As Justice Frankfurter has observed, "The troublesome phase of construction is the determination of the extent to which extraneous documentation and external circumstances may be allowed to infiltrate the text on the theory that they were part of it, written in ink visible to the judicial eye."[129] Here, the hues of the cited history are not sufficiently bold as to overwhelm the clear terms of § 704(a) itself. In view of the "high priority" that Congress has given to the effort to eliminate employment discrimination,[130] we are unwilling

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129. Frankfurther, *Some Reflections on the Reading of Statutes,* 47 Colum. L. Rev. 527, 529 (1947).

130. *Alexander v. Gardner-Denver Co.,* 415 U.S. 36, 47-48 (1974).

The defendants also point to the comparable anti-retaliation provisions in the National Labor Relations Act 29 U.S.C. § 158(a)(4) and Fair Labor Standards Act 29 U.S.C. § 215(1)(3), which protect only complaints of statutory violations made through the administrative channels established by the legislative scheme. They suggest that any divergence from the approach of the FLSA and NLRA would have evoked comment in the legislative history, and that the lack of such comment negatives the possibility of protection for self-help remedies. We are not persuaded by this inference. As the Fifth Circuit noted, the language of the Title VII provision is broader than that of the FLSA and NLRA, and in general, "the difference between those Acts and Title VII may well outnumber the similarities." *Pettway v. American Cast Iron Pipe Co.,* 411 F.2d 998, 1006 (5th Cir. 1969). For example, the structure of Title VII has been held explicitly to contemplate multiple avenues for relief, without either preemption or primary jurisdiction vesting in the EEOC. *See Gardner Denver, supra* 415 U.S. at 48.

to withdraw protection from oppohents of illegal discrimination through a constricted statutory construction.

The Supreme Court has not yet delimited the scope of the "opposition" that § 704(a) will be held to safeguard,[131] and the bulk of cases under § 704(a) have involved alleged retaliation for complaints or litigation under Title VII.[132] Nonetheless, several courts of appeals have understood § 704(a) to reach beyond protecting participation in Title VII procedures.

In *Hicks v. Abt Assoc.,*[133] this Court held a complaint to the Department of Housing and Urban Development regarding alleged employment discrimination in a project which it funded to constitute "opposition" within the terms of the statute. Likewise, in *Green v. McDonnell Douglas Corp.,*[134] the Eighth Circuit, while rejecting protection for unlawful activities, stated: "Those who have the courage to challenge discriminatory practices of an employer merit [statutory] protection. Without doubt, lawful protest also commands the

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131. *See Emporium Capwell Co. v. Community Org.,* 420 U.S. 50, 71 n.25 (1975) (declining to resolve issue); *McDonnell Douglas Corp. v. Green,* 411 U.S. 792, 797 n.6 (1973) (issue not appealed).

132. *E.g. Rutherford v. American Bank of Commerce,* 565 F.2d 1162 (10th Cir. 1977); *Corley v. Jackson Police Dept.,* 566 F.2d 94 (5th Cir. 1978); *Adams v. Reed,* 567 F.2d 1283 (5th Cir. 1978); *Brown v. Ralston Purina Co.,* 557 F.2d 570 (6th Cir. 1977); *Dawkins v. Nabisco, Inc.,* 549 F.2d 396 (5th Cir.) *cert. denied* 433 U.S. 910 (1977); *Smith v. Rexall Drugs,* 548 F.2d 762 (8th Cir. 1977).

133. 572 F.2d 960 (3d Cir. 1978).

134. 463 F.2d 337, 341 (1972), not challenged or appealed on this point, 411 U.S. 792, 797 n.6 (1973).

same protection. . . ." And, while in *Pettway, supra* the Fifth Circuit concentrated on the protection afforded to Title VII complainants, in *Balderas v. LaCasita Farms, Inc.*,[135] another panel of that Circuit declared that an element of an action under § 704(a) is "discrimination based upon the employee's opposition to unlawful practices," as manifested in "civil rights activities."[136]

We recognize that to construe § 704(a) as protecting "opposition" beyond that embodied in participation in Title VII proceedings carries with it the prospect of a greater burden of litigation for employers than the interpretation urged by the defendants. Indeed, it may present the danger of harassment by employees who suffer some imagined slight based on a chance remark. Yet these dangers are implicit in any decision to recognize legal rights; to decrease the pressure of litigation on employers by the simple expedient of refusing to protect employees is always an option. Congress, however, has passed legislation extending the shield of Title VII to "opposition," and the possibility of abuse by litigious plaintiffs cannot justify withdrawal of that bulwark.

Rather, the courts must rely upon the procedures that are used to weed out frivolous claims under any statute. If, on a motion for summary judgment, Novotny cannot come forward with support for his contention that he opposed the denial of equal employment opportunities by GAF, or that he was terminated as a result of such opposition, of course his claim cannot be sustained. Such a determination, however, is for the district court after proper opportunity for discovery.

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135. 500 F.2d 195 (1974).

136. *Id.* 198-99.

Likewise, this opinion does not suggest that opposition to employer violations of Title VII confers an irrevocable tenure on the opponent. Clearly, illegal actions would be grounds for discharge,[137] as would activities that unreasonably interfere with the employer's legitimate interests.[138] As the First Circuit has stated, in situations of "opposition" in the form of self-help "courts have in each case to balance the purpose of the Act to protect persons engaging reasonably in activities opposing . . . discrimination against Congress' equally manifest desire not to tie the hands of employers in the objective selection and control of personnel."[139] But such matters are issues for defense, and it is inappropriate to resolve them on a motion to dismiss.

IV. Conclusion

The questions with which we have dealt have been in large measure matters of statutory construction, replete with the ambiguities that legislative enactments on occasion engender. The Ku Klux Klan Act of 1871 was adopted to deal with a pressing problem of Reconstruction; yet its commands were couched in expan-

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137. *Green v. McDonnell-Douglas Corp.*, 463 F.2d 337, 341 (8th Cir. 1972) *upheld on this point for lack of appeal; McDonnell-Douglas Corp. v. Green*, 411 U.S. 792, 797 n.6 (1973) ("Nothing in Title VII compels an employer to absolve and rehire one who has engaged in such deliberate unlawful activity against it.") *See id.* at 803.

138. *See Emporium Capwell Co. v. Community Org.*, 420 U.S. 50, 69 (1975) (rights under Title VII "cannot be pursued at the expense of the orderly collective bargaining process contemplated by NLRA").

139. *Hochstadt v. Worcester Foundation Inc.*, 545 F.2d 222, 231 (1st Cir. 1976). *See also Ammons v. Zia Co.*, 448 F.2d 117 (10th Cir. 1971) (Aldisert, J.).

sively drafted legislation, whose provisions are now, not implausibly, called upon to traverse a century of social, economic and political development to come to the aid of human rights. The Civil Rights Act of 1964, though more tightly and technically constructed, and more recent in origin, confronts us with the duty of reconciling an explicit statutory mandate with an opaque legislative history.

There is material from which defendants can argue the inapplicability of both statutes to this case. Narrowly construed, either enactment could fall well short of providing the plaintiff a cause of action. But the statutory landscape is illuminated by the community's goals as well as the emanations of legislative history. To hobble the legislation before us would, without justification, set judicial authority against the effort to achieve equality of rights. We do not believe such was the intent of the Congressmen who in the aftermath of the Civil War began the task nor of their successors in 1964 who mandated its continuance. With this in mind, we have concluded:

(1) That § 1985(3) protects against conspiracies motivated by discriminatory animus against women.

(2) That a male injured in furtherance of such a conspiracy has standing to bring an action under § 1985(3).

(3) That collusive action to deprive women of equal employment opportunities in violation of Federal law would be conspiracy to deprive of "equal privileges and immunities" in violation of § 1985(3).

(4) That a cause of action under § 1985(3) grounded on such a conspiracy is not precluded by Title VII.

(5) That as applied to such a conspiracy by private employers § 1985(3) does not exceed Congress' constitutional authority under the commerce clause.

(6) That individuals who are directors and officers of a corporation can form a conspiracy in violation of § 1985(3); and

(7) That § 704(a) of Title VII prohibits retaliation against employees for reasonable opposition to unlawful employment discrimination even when such opposition is not manifested through participation in Title VII proceedings.

The judgment of the district court will be reversed and the case remanded for proceedings consistent with this opinion.

APPENDIX

SECTION 2 OF THE KU KLUX KLAN ACT OF 1871
[PORTIONS LATER RECODIFIED AS § 1985(3) ARE UNDERSCORED]

Sec. 2. *That if two or more persons within any State or Territory of the United States shall conspire together* to overthrow, or to put down, or to destroy by force the government of the United States, or to levy war against the United States, or to oppose by force the authority of the government of the United States, or by force, intimidation, or threat to prevent, hinder, or delay the execution of any law of the United States, or by force to seize, take, or possess any property of the United States contrary to the authority thereof, or by force, intimidation, or threat to prevent any person from accepting or holding any office or trust or place of confidence under the United States, or from discharging the duties thereof, or by force, intimidation, or threat to induce any officer of the United States to leave any State, district, or place where his duties as such officer might lawfully be performed, or to injure him in his person or property on account of his lawful discharge of the duties of his office, or to injure his person while engaged in the lawful discharge of the duties of his office, or to injure his property so as to molest, interrupt, hinder, or impede him in the discharge of his official duty, or *by force, intimidation, or threat to deter any party or witness in any court of the United States from attending such court, or from testifying in any matter pending in such court fully, freely, and truthfully, or to injure any such party or witness in his person or property on account of his having so attended or testified, or by force, intimidation, or threat to influence*

the verdict, presentment, or indictment, of any juror or grand juror in any court of the United States, or to injure such juror in his person or property on account of any verdict, presentment, or indictment lawfully assented to by him, or an account of his being or having been such juror, or shall conspire together, or go in disguise upon the public highway or upon the premises of another for the purpose, either directly or indirectly, of depriving any person or any class of persons of the equal protection of the laws, or of equal privileges or immunities under the laws, or for the purpose of preventing or hindering the constituted authorities of any State from giving or securing to all persons within such State the equal protection of the laws, or *shall conspire together for the purpose of in any manner, impeding, hindering, obstructing, or defeating the due course of justice in any State or Territory, with intent to deny to any citizen of the United States the due and equal protection of the laws, or to injure any person in his person or his property for lawfully enforcing the right of any person or class of persons to the equal protection of the laws,* or by force, intimidation, or threat to prevent any citizen of the United States lawfully entitled to vote from giving his support or advocacy in a lawful manner towards or in favor of the election of any lawfully qualified person as an elector of President or Vice-President of the United States, or as a member of the Congress of the United States, or to injure any such citizen in his person or property on account of such support or advocacy each and every person so offending shall be deemed guilty of a high crime, and, upon conviction thereof in any district or circuit court of the United States or district or supreme court of any Terri-

tory of the United States having jurisdiction of similar offences, shall be punished by a fine not less than five hundred nor more than five thousand dollars, or by imprisonment, with or without hard labor, as the court may determine, for a period of not less than six months nor more than six years, as the court may determine, or by both such fine and imprisonment as the court shall determine. And if any one or more persons engaged in any such conspiracy shall do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby any person shall be injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the persons so injured or deprived of such rights and privileges may have and maintain an action for the recovery of damages occasioned by such injury or deprivation of rights and privileges against any one or more of the persons engaged in such conspiracy, such action to be prosecuted in the proper district or circuit court of the United States, with and subject to the same rights of appeal, review upon error, and other remedies provided in like cases in such courts under the provisions of the act of April ninth, eighteen hundred and sixty-six, entitled "An act to protect all persons in the United States in their civil rights, and to furnish the means of their vindication."

(Emphasis added.)

A True Copy:
Teste:

Clerk of the United States Court of Appeals for the Third Circuit

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APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

JOHN R. NOVOTNY
v.
GREAT AMERICAN FEDERAL SAVINGS & LOAN ASSOCIATION, JOHN A. VIROSTEK, JOSEPH E. BUGEL, JOHN J. DRAVECKY, DANIEL T. KUBASAK, EDWARD J. LESKO, JAMES E. ORRIS, JOSEPH A. PROKOPOVITSH, JOHN G. MICENKO and FRANK J. VANEK

Civil Action No. 76-1580

Opinion

SNYDER, J.

John R. Novotny filed this Complaint against Great American Federal Savings & Loan (GAF) under 42 U.S.C. § 1985(3), invoking jurisdiction under 28 U.S.C. § 1343 and Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.*, alleging that GAF fired him from his position because he charged them with discrimination against female employees. GAF has moved to dismiss the Complaint, and the Motion will be granted.

John Novotny was employed by GAF in 1950 and at the time of his termination was an undesignated employee, having not been reelected as Secretary or as a Member of the Board of Directors. He contends that from January, 1966, the individual Defendants, on behalf of GAF, "embarked upon a course of conduct the effect of which was to deny the female employees equal employment opportunity . . . for promotion and advancement." He listed the following types of actions:

"(a) Promoting male employees with less experience, fewer years of service and less qualification over more qualified female employees;

(b) Providing education and training to male employees which was not provided to female employees;

(c) Making known to male employees job vacancies which were not made known to female employees;

(d) Evaluating male employees in accordance with different and subjective criteria than those applied to female employees;

(e) Categorizing certain jobs as 'male' or 'female' and promoting in accordance with these categories;

(f) Creating an atmosphere inimical to the asperations [sic] of female employees by subjecting all female employees to the supervision and control [sic]

(g) By providing different and lesser degrees of fringe benefits to female employees than to male employees.

(h) By demoting qualified female employees and replacing them with less qualified male employees."

The female employees had expressed their dissatisfaction with the company's policy, and one of them was fired. Novotny alleges that he supported the female employees before the Board and claims a conspiracy of the individual Defendants to prevent his support of equal employment rights for women. He demands money damages from the Defendants in his Complaint and asks that they be enjoined from any further acts of discrimination and ordered to comply with applicable provisions of the law dealing with equal employment opportunity.[1]

NOVOTNY'S STANDING

The Defendants assert Novotny's lack of standing since he is not being discriminated against. Novotny counters that the Supreme Court in *Griffin v. Breckenridge,* 403 U.S. 88, 91 S.Ct. 1790, 29 L.Ed.2d 338 (1971), held that a plaintiff need not be a member of the class toward which the invidiously discriminatory animus is directed. The Defendants distinguish *Richardson v. Miller,* 446 F.2d 1247 (3d Cir. 1971) which allowed a non-member to recover, stating that decision was based on the fact the plaintiff was proceeding *pro se* and that fact persuaded the court to be more liberal in its application of the § 1985(3) remedy. Also, the Defendants contend that the *Richardson* case dealt with an issue of race discrimination, and that discrimination on that basis is *per se* invidious, whereas the discrimination alleged to have occurred here is one based on sex, which does not enjoy the same status in the courts.

This issue has been addressed by another member of this Court in *Pendrell v. Chatham College,* 386 F.Supp. 341, 348 (W.D. Pa. 1974),[2] where Judge Hubert I. Teitelbaum said (at p. 348):

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1. Novotny filed a charge with the Equal Employment Opportunity Commission and on December 9, 1976, received a "right to sue" letter from the Commission. He timely brought this suit complying with the requirements of 42 U.S.C. § 2000e-5.

2. Pendrell interprets *Phillips v. Trello,* 502 F.2d 1000 (3d Cir. 1974) in which Judge Gibbons stated (at p. 1005):

"The first question here then is whether a § 1985(3) claim must be based upon an allegation of conspiracy to discriminate because of membership in a racial or perhaps otherwise class-based group or whether an allegation of conspiracy to discriminate because of one's advocacy of the rights of such a group is sufficient. Following what I believe to be the clear inference from Judge Gibbons' expression in *Phillips,* I hold that discrimination because of advocacy of the rights of a racial or otherwise class-based group is sufficient. Nothing less would appear to be compatible with making ' . . . actionable private conspiracies to deprive a citizen of the equal enjoyment of rights secured to all.' I do not mean by this to preclude an even broader extension in an appropriate case. Whether such application might be indicated under other circumstances, I need not here consider because the factual situation here presented does not necessitate such decision."

We realize that Pendrell, as a woman, was a member of the protected class. (Deft's Brief 11-12). In Judge Teitelbaum's earlier opinion in *Pendrell* (370 F.Supp. 494 (W.D. Pa. 1974)), it was pointed out that she was terminated from her employment for "academic and extracurricular involvement in the struggle[s] of black

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"Since the plaintiffs in *Griffin v. Breckenridge* were Negro citizens of Mississippi and charged harrassment on racial grounds, the Court expressly reserved the question whether a conspiracy motivated by individiously discriminatory intent other than racial bias would be actionable under § 1985(3) [Citation omitted] Since then the task of defining the scope of the private conspiracy cause of action under § 1985(3) has been going forward in the lower federal courts."

people [and women] for liberation, for basic equality, and freedom of oppression."

We believe that under the *Pendrell* decisions Novotny is not barred from bringing this suit under § 1985 (3) simply because he is a male since he alleges suffering a sex-based discrimination.

ACTS BY A SINGLE ENTITY

The Defendants contend that any acts here were by a single entity and thus no conspiracy is charged. They point to *Dombrowski v. Dowling,* 459 F.2d 190 (7th Cir. 1972), in which the plaintiff, a white lawyer, allegedly was denied the opportunity to rent office space from a corporate landlord and its agents when the landlord found that many of the plaintiff's clients were black. In deciding the adequacy of the allegations of the Complaint to sustain a claim of § 1985(3) violation, the Seventh Circuit stated: (at p. 196)

" . . . [i]f the challenged conduct is essentially a single act of discrimination by a single business entity, the fact that two or more agents participated in the decision or in the act itself will normally not constitute the conspiracy contemplated by this statute. *Cf. Morrison v. California,* 291 U.S. 82, 92, 54 S.Ct. 281, 78 L.Ed. 664. In this case we believe the evidence fails to establish this element of a § 1985(3) violation."

We note in *Rackin v. University of Pennsylvania,* 386 F.Supp. 992 (E.D. Pa. 1974), an English professor claimed denial of tenure by the University, despite recommendations from the tenured members of her department, because she was a woman. The Court denied ap-

plication of the *Dombrowski* characterization saying: (at pp. 1005-06)

> "[the plaintiff] has alleged many continuing instances of discrimination and harassing treatment by the alleged conspirators. Her allegations comprise much more than 'essentially a single act of discrimination by a single business entity' and therefore the Dombrowski decision is inapplicable."

Novotny here claims that the Complaint has described, with sufficient factual specificity, numerous acts and patterns of discrimination practiced by the corporation against its female employees since 1966, and that therefore an application of the *Rackin* analysis is appropriate.

We believe that Novotny has overlooked an essential element here in that he has suffered only one act of discrimination: his termination in January, 1975.[3] The Complaint does list many acts done by the corporation for which female employees may possibly have a recourse, but those acts were not directed to the Plaintiff himself.

In *Rackin* the court rejected the defendant's contention that Rackin suffered but one act of discrimination (denial of tenure) because the facts alleged in the complaint, if true, clearly showed that she was denied, for a period of at least eight years, privileges enjoyed by the other faculty members because of her sex.

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3. On or about January 22, 1975, at the annual meeting of the Association, Novotny was not re-elected as the secretary or member of the Board of Directors and further was terminated from his employment with GAF. (Complaint, p. 4)

Taking Novotny's allegations in his Complaint as true,[4] he has suffered but a single act of "business entity" discrimination by his termination. More is needed to sustain a claim under § 1985(3) and the Defendants' Motion to Dismiss will be granted as to that cause of action.[5]

THE ALLEGED § 2000e VIOLATION

In their brief, the Defendants contest Novotny's use of 42 U.S.C. § 2000e which provides (2000e-3):

> "It shall be an unlawful employment practice for an employer to discriminate against any of his employees . . . because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter."

And they cite in support of their position the Legislative History of the Section which reads (2 U.S. Code, Cong. & Adm. News, 1964, p. 2403):

> "Section [2000e-3] makes it an unlawful employment practice for an *employer* to discriminate against any of his employees or applicants for employment, for an employment agency to discrimi-

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4. For purposes of this Motion, all well pleaded material allegations of the Complaint must be taken as true. *See, Walker Process Equip. Inc. v. Food Mach. & Chem. Corp.*, 382 U.S. 172, 86 S. Ct. 347, 15 L.Ed.2d 247 (1965).

5. Because of this decision, we need not reach the other issues raised by the Defendants in their challenge to Novotny's § 1985 claim.

nate against any individual, or for a labor organization to discriminate against any member or applicant for membership, because he has made a charge, testified, assisted, or participated in any manner in the enforcement of the title."

Novotny's Complaint does not allege that he "made a charge, testified, assisted, or participated in any manner in the enforcement of" Section 2000e. He only spoke out against the company policy at a meeting of the Board of Directors. The intent of the Congress was a limited one relating to enforcement of the Title and was not to involve the courts in every board meeting that occurred across the land. It was to prevent acts of retaliation that an employer might otherwise be tempted to perform against an employee because that employee availed himself of his legal right to seek redress for unlawful employment practices. Novotny, by his actions, did not in that sense "oppose" a practice made unlawful by Title VII.

Novotny thus has not provided this Court with any factual basis on which to decide that the Defendants practiced an unlawful employment discrimination in their termination of Novotny which was in violation of 42 U.S.C. § 2000e. At most, the Complaint shows that the female employees have been aggrieved by the actions of GAF but, Novotny has not shown a potential prejudice which he has, or would suffer by the alleged illegal discriminatory employment practices charged in his Complaint for which the Civil Rights laws can give him remedy. The Complaint does not raise "issues as to which he is aggrieved," *Oatis v. Crown Zellerbach Corp.*, 398 F.2d 496 (5th Cir. 1968), and this Court concludes that the discrimination alleged by Novotny may not

properly be asserted in a civil action under Title VII. *Jones v. United Gas Improvement Corp.*, 68 F.R.D. 1, 10 (E.D. Pa. 1975).[6]

Since Novotny has not stated a claim for which relief can be granted under 42 U.S.C. § 1985(3) or under 42 U.S.C. § 2000e, the Defendants' Motion to Dismiss the Complaint will be granted.

An appropriate Order will be entered.

DANIEL J. SNYDER, JR.
United States District Judge

Dated: April 22, 1977

cc: Stanley Stein, Esq.
Law & Finance Building
Pittsburgh, Pa. 15219

Eugene Connors, Esq. and Walter Bleil, Esq.
747 Union Trust Building
Pittsburgh, Pa. 15219

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6. Again, our disposition of this issue precludes our consideration of the Defendants' other contentions regarding Novotny's Section.

Appendix B.

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

JOHN R. NOVOTNY
v.
GREAT AMERICAN FEDERAL SAVINGS & LOAN ASSOCIATION, JOHN A. VIROSTEK, JOSEPH E. BUGEL, JOHN J. DRAVECKY, DANIEL T. KUBASAK, EDWARD J. LESKO, JAMES E. ORRIS, JOSEPH A. PROKOPOVITSH, JOHN G. MICENKO and FRANK J. VANEK

Civil Action No. 76-1580

Order of Court

AND NOW, to-wit, this 22nd day of April, 1977, after due consideration of the arguments and briefs of counsel, and for the reasons set forth in the Opinion filed herewith,

IT IS HEREBY ORDERED that the Defendants' Motion to Dismiss the Complaint be and the same is hereby granted.

DANIEL J. SNYDER, JR.
United States District Judge

cc: Stanley Stein, Esq.

Eugene Connors, Esq. and Walter Bleil, Esq.

Appendix C.

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

JOHN R. NOVOTNY,
Plaintiff
vs.
GREAT AMERICAN FEDERAL SAVINGS & LOAN ASSOCIATION, JOHN A. VIROSTEK, JOSEPH E. BUGEL, JOHN J. DRAVECKY, DANIEL T. KUBASAK, EDWARD J. LESKO, JAMES E. ORRIS, JOSEPH A. PROKOPOVITSH, JOHN G. MICENKO and FRANK J. VANEK,
Defendants

Jury Trial Demanded No. 76-1580

Complaint

I. JURISDICTION:

1. The jurisdiction of this Court is founded upon Title 28 U.S.C. § 1343, relating to actions for deprivation of civil rights, and Title 42 U.S.C. § 2000e(5), relating to discrimination in employment.

II. PARTIES:

2. John R. Novotny, plaintiff, hereinafter called "Novotny," is an individual resident of Allegheny County, Pennsylvania.

3. Defendant, Great American Federal Savings and Loan, hereinafter called "GAF," known previously as First Federal Savings & Loan, is a mutual Federal Savings & Loan Association, organized and existing under

Federal law and charter, for the purpose of promoting thrift and home ownership.

4. Defendant, John A. Virostek, is an individual who is presently Director Emeritus of GAF, and at times relevant hereto he was chairman of the Board of Directors of GAF and its Senior Solicitor.

5. Defendant, Joseph E. Bugel, is an individual who is presently Chairman of the Board of GAF, and at times relevant hereto was Vice-Chairman of the Board of GAF.

6. Defendant John J. Dravecky, is an individual who is and was at all times relevant hereto Vice-President of GAF.

7. Defendant, Daniel T. Kubasak, is an individual who is and was at all times relevant hereto President of GAF.

8. Defendant, Edward J. Lesko, is an individual who is a member of the GAF Board of Directors and at times relevant hereto was the junior solicitor of GAF.

9. Defendant, James E. Orris, is an individual who is a member of the Board of Directors of GAF, and was at times relevant hereto President of GAF.

10. Defendant, Joseph A. Prokopovitsh, is an individual who is presently and at all times relevant hereto, was a member of the Board of Directors of GAF.

11. Defendant, John G. Micenko, is an individual who is presently Executive Vice-President of GAF, and at times relevant hereto, was treasurer and secretary of GAF.

12. Defendant, Frank J. Vanek, is an individual who is presently Vice-President and Controller of GAF, and at times relevant hereto was Controller of GAF.

III. FACTS:

13. Novotny was hired by GAF on or about May 1, 1950, as a clerk, and subsequently became a loan officer, treasurer, secretary and member of the Board of Directors.

14. Novotny was terminated from his employment with GAF on January 22, 1975, and at the time of his termination of his employment, he was an undesignated employee, having not been re-elected secretary of the association at its annual meeting on January 22, 1975.

15. At the time of his termination, Novotny was earning $3,825.00 per month as an employee of GAF, and was an employee in good standing who would not have been terminated but for the matters set out below. In addition, Novotny earned $250.00 for each of twenty-six (26) meetings of the Board of Directors which he attended per year.

16. Beginning at times in the past, the exact dates of which are unknown to Novotny, but which began or continued after January 1, 1966, individual defendants, on behalf of GAF, intentionally and deliberately embarked upon and pursued a course of conduct the effect of which was to deny to female employees equal employment opportunity and, specifically, equal opportunity for promotion and advancement.

17. Said course of conduct was characterized by some or all of the following actions, inter alia:

(a) Promoting male employees with less experience, fewer years of service and less qualification over more qualified female employees;

(b) Providing education and training to male employees which was not provided to female employees;

(c) Making known to male employees job vacancies which were not made known to female employees;

(d) Evaluating male employees in accordance with different and subjective criteria than those applied to female employees;

(e) Categorizing certain jobs as "male" or "female" and promoting in accordance with these categories;

(f) Creating an atmosphere inimical to the asperations [sic] of female employees by subjecting all female employees to the supervision and control;

(g) By providing different and lesser degrees of fringe benefits to female employees than to male employees;

(h) By demoting qualified female employees and replacing them with less qualified male employees.

18. Said course of conduct constitutes an ongoing discrimination and continues to the present time.

19. During July, 1974, said course of conduct manifested itself in the demotion of a female employee, Betty Batis from a position of head teller to the position of savings counselor, and her replacement by a less qualified male employee.

20. As a result of said demotion, Betty Batis and several female employees of GAF made known to Defendant Kubasak their displeasure at the demotion and as well at the general employment practices of GAF

which had indicated the existence of sex-based employment discrimination.

21. As a result of said protestations, Betty Batis was terminated from her employment, although she was subsequently rehired in a lower position after being required to submit a letter of apology to the individual defendants.

22. During a meeting of the Board of Directors, however, Novotny expressed his general support for the female employees who had made their protest and expressed various opinions with regard to the obligations of GAF in terms of employment discrimination and equal employment opportunity, and further indicated his refusal to support the majority decision on the Board of Directors with regard to the termination of Batis.

23. On or about January 22, 1975, at the annual meeting of the Association, Novotny was not re-elected as the secretary or member of the Board of Directors and further was terminated from his employment with GAF.

24. Said termination bore no relationship to the ability with which Novotny carried on his employment duties with GAF, but was solely the result of Novotny's support of the equal employment opportunity claims of the female employees of GAF and as well as the result of Novotny's expressed opinions in support of Batis and the other female employees, which opinions were made by Novotny in accordance with his rights under the Constitutions of the United States and the Commonwealth of Pennsylvania.

25. In addition, Novotny was terminated because of his known support for equal employment opportunity for women within the GAF organization.

26. In addition, the termination of Novotny resulted from an agreement and conspiracy by and among the individual defendants to deprive Novotny of and to penalize him for the exercise of his constitutional rights to freedom of expression and association, particularly as said expression and associations involved the furtherance of equal opportunity employment for women.

27. In addition, Novotny was terminated because he was, in his position as an employee and secretary of the association and a member of the Board of Directors, in a position to affect actions and procedures to implement equal employment opportunities for women and to provide to female employees training, education and responsibilities equal to that of male employees.

IV. CAUSES OF ACTION:

28. The termination of Novotny was accomplished by the individual defendants in violation of Title 42, U.S.C. § 1985 relating to conspiracies to deprive individuals of their rights under the Constitution of the United States.

29. Further, the termination of Novotny was accomplished in violation of Title 42, U.S.C. § 2000e(5), relating to equal employment opportunities, pursuant to a pattern of practice of the individual defendants, on behalf of GAF, to discriminate against female employees in hiring, promotion and advancement.

30. As a result of the conspiracy by the individual defendants and the unlawful discriminatory patterns, Novotny was deprived of his income from January 22, 1975, and will be deprived of said income in the future.

31. As a further result of the conspiratorial and discriminatory actions of the individual defendants as aforesaid, Novotny suffered humiliation and embarrassment and his ability to obtain employment in the future as been severely curtailed and hampered.

32. As a further result of the conspiratorial and discriminatory actions of the individual defendants as aforesaid, Novotny has been required to engage in services of attorneys to gain redress for the damages done to him.

33. At all times relevant hereto, the individual defendants were and are acting on behalf of GAF.

V. EXHAUSTION OF ADMINISTRATIVE REMEDIES:

On or about January 29, 1975, Novotny filed a charge of discrimination with the Equal Employment Opportunity Commission and on the 9th day of December, 1976, he received from the Commission his right to file suit in accordance with the provisions of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e(5). Novotny has in all other respects complied with all applicable provisions of the law with regard to the exhaustion of his administrative remedies prior to the filing of suit.

WHEREFORE, Plaintiff requests this Honorable Court to:

(a) Enter judgment in favor of plaintiff and against the defendants, individually, jointly and severally, for an amount equal to the monetary damages suffered as a result of his unlawful termination;

(b) Enter judgment in favor of plaintiff and against the defendants, individually, jointly and severally for attorneys' fees and costs of suit;

(c) Enjoin defendants, individually and jointly from further acts of discrimination, and order the defendants to comply with applicable provisions of the law dealing with equal employment opportunity.

Respectfully submitted,

By STANLEY M. STEIN
Stanley M. Stein, Esquire

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 6th day of November, 1978, three copies of the Petition for Writ of Certiorari were mailed, postage prepaid, to Stanley M. Stein, Esquire, Law & Finance Building, Pittsburgh, Pennsylvania 15219, Counsel for the Respondent. I further certify that all parties required to be served have been served.

JOHN G. WAYMAN

REED SMITH SHAW & MCCLAY
747 Union Trust Building
Pittsburgh, Pennsylvania 15219

Counsel for Petitioners.

Dated: November 6, 1978

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-753

GREAT AMERICAN FEDERAL SAVINGS & LOAN ASSOCIATION, JOHN A. VIROSTEK, JOSEPH E. BUGEL, JOHN J. DRAVECKY, DANIEL T. KUBASAK, EDWARD J. LESKO, JAMES E. ORRIS, JOSEPH A. PROKOPOVITSH, JOHN G. MICENKO AND FRANK J. VANEK,
Petitioners,

v.

JOHN R. NOVOTNY,
Respondent.

BRIEF *AMICUS CURIAE* OF THE EQUAL EMPLOYMENT ADVISORY COUNCIL IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-753

GREAT AMERICAN FEDERAL SAVINGS & LOAN ASSOCIATION, JOHN A. VIROSTEK, JOSEPH E. BUGEL, JOHN J. DRAVECKY, DANIEL T. KUBASAK, EDWARD J. LESKO, JAMES E. ORRIS, JOSEPH A. PROKOPOVITSH, JOHN G. MICENKO AND FRANK J. VANEK,
Petitioners,

v.

JOHN R. NOVOTNY,
Respondent.

MOTION OF THE EQUAL EMPLOYMENT ADVISORY COUNCIL FOR LEAVE TO SUBMIT BRIEF AS *AMICUS CURIAE* IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

To the Honorable, the Chief Justice and the Associate Justices of the United States Supreme Court:

Pursuant to Rule 42(3) of the Rules of this Court, the Equal Employment Advisory Council ("EEAC") moves this Court for leave to file the accompanying brief as *Amicus Curiae* supporting the petitioners,

Great American Federal Savings & Loan Association ("Association"), *et al*, in this case. In support of this motion, EEAC shows as follows:

1. EEAC is a voluntary nonprofit association organized to promote the common interest of employers and the general public in the development and implementation of sound government policies, procedures and requirements pertaining to nondiscriminatory employment practices. Its membership comprises a broad segment of the employer community in the United States, including both individual employers and trade associations. Its governing body is a Board of Directors composed primarily of specialists in the field of equal employment opportunity, whose combined experience gives the Council a unique depth of understanding of the practical and legal considerations relevant to the proper interpretation and application of EEO policies and requirements.

2. Substantially all of EEAC's members, or their constituents, are employers subject to the provisions of Title VII of the Civil Rights Act of 1964 (42 U.S.C. § 2000e, *et seq.*) and 42 U.S.C. § 1985(3), as applied by the Court below, as well as other equal employment statutes and regulations. Most of EEAC's member representatives—many of whom are corporate officers—are charged with corporate responsibility for compliance with the various federal, state and local statutes, regulations and orders dealing with equal employment opportunity. As such, they have a direct interest in the issues presented for the Court's consideration in the instant case—i.e., whether the Third Circuit erred in holding that 42 U.S.C. § 1985(3) may be construed to apply to an alleged conspiracy among officers and directors of a single corporation to violate Title VII.

3. Because of its interest in issues pertaining to equal employment, on several other occasions, EEAC sought and was granted permission by this Court to file briefs as *Amicus Curiae*. See, e.g., *Furnco Construction Corp.* v. *Waters*, —— U.S. ——, 46 U.S. L.W. 4966 (1978); *Trans World Airlines, Inc.* v. *Hardison*, 432 U.S. 63 (1977); *Gardner* v. *Westinghouse Broadcasting Company*, 46 U.S.L.W. 4761 (1978); and *Shell Oil Company* v. *Anne M. Dartt*, 434 U.S. 98 (1977).

4. EEAC also has filed briefs as *Amicus Curiae* with the consent of the parties in a number of other recent cases raising important equal employment issues. See, e.g., *The Regents of the University of California* v. *Allan Bakke*, 98 Sup. Ct. 2733, 48 U.S.L.W. 4896 (1978); *County of Los Angeles* v. *Davis* (No. 77-1553), *petition for cert. granted* (involves 42 U.S.C. § 1981); *Kaiser Aluminum & Chemical Corporation* v. *Weber* (No. 78-435), *petition for cert. pending*; *Int'l Brotherhood of Teamsters* v. *United States*, 431 U.S. 324 (1977); *East Texas Motor Freight Systems, Inc.* v. *Rodriguez*, 431 U.S. 395 (1977); and *United Air Lines, Inc.* v. *Evans*, 431 U.S. 553 (1977).

5. The movant, EEAC, and its members, have broad knowledge concerning the practical and legal application of the statutes and related issues involved in this case. Because of this knowledge and its extensive experience as *amicus curiae* in other civil rights cases, the *Amicus* is well situated to brief this Court on the practical as well as legal implications of the issues presented by the decision below.

6. The written consent of counsel for the petitioners to the filing of this brief has been filed with the Clerk of the Court. On November 3, 1978, counsel for respondent informed the undersigned that he would forward a letter stating that he had no objection to the filing of this brief. As this letter has not yet been received, however, this motion is required under Supreme Court Rule 42.

WHEREFORE, it is respectfully moved that the EEAC be granted leave to file the accompanying brief *Amicus Curiae* in this case.

Respectfully submitted,

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November, 1978

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-753

GREAT AMERICAN FEDERAL SAVINGS & LOAN ASSOCIATION, JOHN A. VIROSTEK, JOSEPH E. BUGEL, JOHN J. DRAVECKY, DANIEL T. KUBASAK, EDWARD J. LESKO, JAMES E. ORRIS, JOSEPH A. PROKOPOVITSH, JOHN G. MICENKO AND FRANK J. VANEK,
Petitioners,

v.

JOHN R. NOVOTNY,
Respondent.

BRIEF *AMICUS CURIAE* OF THE EQUAL EMPLOYMENT ADVISORY COUNCIL IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

The Equal Employment Advisory Council ("EEAC") respectfully submits this brief *amicus curiae* in support of the petition for a writ of certiorari in this case filed by Great American Federal Savings & Loan Association, *et al* ("Association").

STATEMENT OF THE CASE

Respondent John R. Novotny initiated this suit under 42 U.S.C. § 1985(3) and Section 704(a) of Title VII, alleging that Petitioner Great American Federal Savings & Loan Association and the individual Petitioners, its officers and directors, terminated him from his position as an officer of the Association because of his efforts to secure equal employment opportunities on behalf of female employees of the Association. Novotny also alleged that the individual petitioners had intentionally and deliberately embarked upon a course of conduct the effect of which was to deny female employees equal employment opportunity.

The district court, dismissed the complaint in its entirety. The alleged cause of action under 42 U.S.C. § 1985(3) was dismissed because the complaint stated that "at all times relevant hereto, the individual defendants were and are acting on behalf of GAF." Complaint, ¶ 33. The court held that this allegation negated the existence of the requisite conspiracy under Section 1985(3), because only one legal entity, the Association, terminated Novotny. The cause of action under Title VII was dismissed because Section 704(a), its "retaliation" provision, protects only individuals who suffer discrimination because they "made a charge, testified, assisted, or participated in any manner in an investigation, proceeding or hearing" pursuant to Title VII enforcement. The complaint did not allege that Novotny's termination was connected with any such Title VII proceedings.

The Court of Appeals for the Third Circuit *en banc* reversed the district court regarding both counts

of the complaint. With respect to the alleged cause of action under 42 U.S.C. § 1985(3), the Third Circuit held, *inter alia* that the officers and directors of the Association could form a conspiracy for purposes of 42 U.S.C. § 1985(3), and that an alleged violation of Title VII may be included as a deprivation of "equal privileges and immunities" under Section 1985(3). It is these two holdings that are of particular concern to the *Amicus*, EEAC.

REASONS FOR GRANTING THE WRIT

I. THE THIRD CIRCUIT'S HOLDING THAT TITLE VII SUBSTANTIVE RIGHTS MAY BE ENFORCED THOUGH SECTION 1985(3) IS CONTRARY TO THE INTENT OF CONGRESS AND THE DECISIONS OF SEVERAL OTHER CIRCUIT COURTS, AND COULD UNDERMINE THE ADMINISTRATIVE AND CONCILIATION PURPOSES OF TITLE VII.

In construing the relationship between Section 1985(3)[1] and Title VII, the Third Circuit below

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[1] 42 U.S.C. § 1985(3) provides in relevant part:

§ 1985. Conspiracy to interfere with civil rights

* * * *

(3) Depriving persons of rights or privileges. If two or more persons in any State or Territory conspire, or go in disguise on the highway or on the premises of another, for the purpose of depriving, either directly or indirectly, any person or class or persons of the equal protection of the laws, or of equal privileges and immunities under the laws, or for the purpose of preventing or hindering the constituted authorities of any State or Territory from giving or securing to all persons within such State or Territory the equal protection of the laws; . . . in any case

recognized that (Pet. App. 61a-62a):[2]

> There is material from which defendants can argue the inapplicability of both statutes to this case. Narrowly construed, either enactment could fall well short of providing the plaintiff a cause of action.

Indeed, in discussing its pivotal conclusions in this case, the Third Circuit acknowledged that it had parted company with the holdings of other circuit and district courts.[3] Until the conflicts created by the decision below are resolved by this Court, the potential liability of corporate officers will remain uncertain and the enforcement of Title VII and Section 1985(3) may be seriously disrupted.

The court below broadly held that language in Section 1985(3) intended to protect "equal protection of the laws," or "equal privileges and immunities under the laws" includes "the deprivation of a right secured by a federal statute guaranteeing equal employment opportunity." (Pet. App. at 28a).[4]

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of conspiracy set forth in this section, if one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages, occasioned by such injury or deprivation, against any one or more of the conspirators.

[2] "Pet. App." references are to the appendix to the petition of the Association.

[3] These splits of opinion are discussed more fully below.

[4] The court also candidly stated that its analysis was inconsistent with that of two other courts of appeals. (Pet. App. 24a & n. 47; and 28a n. 55), citing *Bellamy* v. *Mason's Stores, Inc.*, 508 F.2d 504, 507 (4th Cir. 1974); and *McLellan* v. *Mississippi Power & Light Co.*, 545 F.2d 919, 924-928 (5th Cir. 1977) (*en banc*).

In so holding, the Third Circuit explicitly noted its disagreement with the decision of the Fourth Circuit in *Doski* v. *Goldseker Co.*, 539 F.2d 1326, 1334 (4th Cir. 1976), that a plaintiff should not be permitted to enforce Title VII rights in a Section 1985(3) suit. (Pet. App. 37a & n. 76). The Fourth Circuit reasoned in *Doski* that such a procedure would be inconsistent with the administrative mechanism established in Title VII. As stated by Judge Craven (539 F.2d at 1334), the court found that Congress

> . . . intended the procedures under [Title VII] to be the exclusive mechanism for effectuating rights created by the statute. We believe that the consistently applied requirement that a complainant cannot entirely bypass the administrative process mandates this result absent expression of congressional intent to the contrary. *See, e.g., Johnson* v. *Seaboard Air Line R.R., supra.* And finding no such indication as to the intent of Congress, we hold that § 1985(3) is not an available mechanism to enforce rights created by Title VII.

The reasoning of the *Doski* decision, however, was completely rejected by the Third Circuit. The significant threat which this conflict poses to the purposes of Title VII justifies and requires the grant of the petition to review the decision below.

The potential problems raised by the Third Circuit's decision are more than of mere academic or passing interest. As a practical matter, they would severely disrupt the statutory scheme devised by Congress to eliminate employment discrimination

by way of Title VII. As this Court has stated, the centerpiece of this scheme is the prompt resolution of discrimination charges through conciliation. See *Occidental Life Insurance Co.* v. *EEOC*, 432 U.S. 355, 359-60 (1977). In *EEOC* v. *Sherwood Medical Industries*, —— F. Supp. ——, 17 FEP Cases 441, 444 (M.D. Fla. 1978), the court noted "the mandate that conciliation be attempted is unique to Title VII and it clearly reflects a strong congressional desire for out-of-court settlement of Title VII violations." Similarly, the Fourth Circuit observed in *Patterson* v. *American Tobacco Co.*, 535 F.2d 257, 272 (4th Cir. 1976), *cert. denied*, 429 U.S. 920 (1977), that the EEOC's "statutory duty to attempt conciliation is among its most essential functions." If Title VII rights may be enforced under Section 1985(3), however, the effect would be to permit plaintiffs in many cases to bypass Title VII procedures designed to promote voluntary and amicable settlements through EEOC-supervised conciliation efforts.

Although the Third Circuit described the remedies provided by Section 1985(3) to be "additional" to those provided by Title VII (Pet. App. 29a), this often would not be the case. Compliance with Title VII's procedural requirements probably would not be a prerequisite for filing a suit under 42 U.S.C. 1985 (3).[5] See *Johnson* v. *Railway Express*, 421 U.S. 464

[5] The substantive provisions of 42 U.S.C. § 1981 should not be confused with those of Section 1985(3). Section 1981 confers substantive rights to individuals to make and enter contracts on the same basis as "white citizens". This right was not withdrawing by the passage of Title VII. *Johnson* v. *Railway Express, supra.* Section 1985(3), however, is a *remedial* statute (Pet. App. 29a). It does not grant any rights but rather incorporates existing "privileges and immunities" to form its substantive content. See *Bellamy* v. *Mason Stores, Inc., supra.*

(1975). The decision of the Third Circuit, therefore, presents employees with an attractive alternative method of enforcing Title VII rights without bothering to comply with some of Title VII's restrictions. For example:

1. Under Title VII, a timely charge must be filed with the Equal Employment Opportunity Commission, within the relatively brief period of 180 days, as a precondition to filing suit. *United Air Lines, Inc.* v. *Evans*, 431 U.S. 553 (1977). Section 1985(3) has no such administrative procedure to exhaust before suit is filed, and a plaintiff can utilize a much longer statute of limitations. *See, e.g., Davis* v. *United States Steel Supply*, 581 F.2d 335 (3d Cir. 1978) (Pennsylvania's statute of limitations for such actions is *six years*).

2. Under Title VII, a plaintiff does not have a right to a trial by jury. *Harmon* v. *May Broadcasting Co.*, —— F.2d ——, 18 FEP Cases 178 (8th Cir. 1978); *Johnson* v. *Georgia Highway Express*, 417 F.2d 1122 (5th Cir. 1969); *Slack* v. *Havens*, 522 F.2d 1091 (9th Cir. 1975).

3. Under Title VII, there is a two-year statutory limitation on recovery of back pay. See Section 706 (g), 42 U.S.C. § 2000e-5(g).

4. Under Title VII, punitive damages may not be recovered. *Richerson* v. *Jones*, 551 F.2d 918 (3rd Cir. 1977).

Accordingly, unless the decision of the Third Circuit is reversed, Section 1985(3) can be utilized as

an unintended means of enforcing Title VII which would undermine Congress' desire for a prompt and voluntary resolution of employment discrimination claims, and could convert Section 1985(3) into a "general federal tort law," a result frowned upon by this Court in *Griffin* v. *Breckenridge*, 403 U.S. 88, 101 (1971). Indeed, the Third Circuit's decision is unnecessary to assure that Title VII is properly enforced, inasmuch as Congress intended that Title VII would provide the "most complete relief" possible to victims of violations of that statute. See *Int'l Brotherhood of Teamsters* v. *United States*, 431 U.S. 324, 364 (1977).[6]

II. THE THIRD CIRCUIT'S HOLDING THAT OFFICERS AND DIRECTORS OF A SINGLE CORPORATION ACTING IN THEIR OFFICIAL CAPACITIES MAY FORM A CIVIL CONSPIRACY FOR PURPOSES OF SECTION 1985(3) CONFLICTS WITH PREVAILING JUDICIAL INTERPRETATIONS AND IMPROPERLY EXPANDS THE SCOPE OF THE STATUTE.

In refusing to affirm the district court's dismissal of the conspiracy allegation, the Third Circuit stated that: ". . . we do not follow the line of cases adopting the rule that concerted action among corporate officers and directors cannot constitute a conspiracy under § 1985(3)." See Pet. App. 55a and cases cited at n. 25, especially *Dombrowski* v. *Dowling*, 459 F.2d 190, 196 (7th Cir. 1972) (Stevens, J.)[7] This posi-

[6] Cf., *United States* v. *East Texas Motor Freight Systems, Inc.*, 564 F.2d 179, 185 (5th Cir. 1977).

[7] In addition to those cases which the court below cited as contrary to its own decision, see *Girard* v. *94th Street & Fifth Ave. Corp.*, 530 F.2d 66, 70 (2d Cir. 1976), *cert. denied*, 425 U.S. 974 (1976); *Lattimore* v. *Loews Theatres, Inc.*, 410 F. Supp. 1397 (M.D. N.C. 1975); and *Cole* v. *University of Hartford*, 391 F. Supp. 888, 892-893 (D. Conn. 1975).

tion which the Third Circuit refused to adopt is the well established rule in cases alleging a "civil" conspiracy,[8] and other courts have recognized that there is nothing peculiar to a federal civil rights action that would justify special reluctance in applying the same principle to Section 1985(3).[9]

In addition to the several conflicting cases cited in footnote 125 of its decision, the Third Circuit brushed aside decisions under the Sherman Antitrust Act, 15 U.S.C. § 1, which also hold that corporate officers cannot form a conspiracy under that statute. The court's rationale for viewing the antitrust decisions as "a distinct line of precedent" (Pet. App. at 53a and n. 121) was that federal antitrust doctrine is rooted in the tension between fostering competition and not intermeddling unnecessarily in the internal entrepreneurial decisions of companies. No parallel was seen with Section 1985(3) because, while almost all corporate decisions might have an impact on

[8] See *Brown* v. *Frito-Lay, Inc.*, 15 FEP Cases 1055, 1058 (D. Kan. 1976); and *Zelinger* v. *Uvalde Rock Asphalt Co.*, 316 F.2d 47 (10th Cir. 1963). Exceptions to this rule are not present in this case, as there is no assertion that the employer's officers acted in their individual rather than corporate capacities (Complaint, ¶ 33; Pet. App. 83a), and the corporate principal clearly was not created with a purpose of shielding any conspiracy. See *Cole* v. *University of Hartford*, *supra*, 391 F. Supp. at 892-893.

[9] *Cf. Johnson* v. *Railway Express Agency, Inc.*, *supra*, 421 U.S. at 463-464.

competitors and thus arguably fall within the antitrust laws, only a "limited number of decisions" would impact on Section 1985(3)'s scope, which includes equal protection, and equal privileges and immunities. (Pet. App. at 54a, n. 21).

This rationale, however, evidences no appreciation of either the scope of the federal equal employment laws or the unrestrained impact of the court's own decision. As noted previously, the Third Circuit reasoned expansively that Section 1985(3) encompasses "the deprivation of a right secured by a federal statute guaranteeing equal employment opportunity." (Pet. App. at 28a). Thus, virtually any corporate action alleged to constitute discrimination on grounds of race, color, religion, sex, national origin, age or handicap could become the basis of a conspiracy suit against the corporation's officers. Some idea of the large number of employment decisions involved may be found in EEOC regulations requiring employers to retain all personnel and employment records having to do with applications for employment, hiring, promotion, demotion, transfer, layoff or termination, and rates of pay. See EEOC: Records and Reports, Subpart C—Record Keeping by Employers, 29 C.F.R. § 1602.14. Additionally, Section 703(h) of Title VII specifically addresses a number of employment areas such as wages, compensation, seniority and merit systems.

Thus, even assuming that the Third Circuit's expansive view of the number of corporate decisions covered by the antitrust laws was not exaggerated, it certainly had no justification for downplaying the extremely broad coverage of the federal equal em-

ployment laws, and the corresponding expansion of Section 1985(3) to cover potentially every corporate employment and personnel decision made by more than one officer.[10]

Accordingly, even if the Third Circuit's conclusion that Title VII and other equal employment statutes fall within the ambit of Section 1985(3) were correct, it does not follow that the conspiracy element of that statute must also be expanded to cover actions taken by corporate officers in their official capacities. To the contrary, the Third Circuit's analysis of the policies underlying antitrust precedent logically impels exactly the opposite result. Because the Third Circuit's decision is both out of step with decisions of other circuits construing the conspiracy elements of Section 1985(3), and is logically contrary to its own view of the rationale justifying a narrow construction of the civil conspiracy requirements of the federal antitrust laws, review of the decision below by this Court is required to clarify important statutory questions and ensure the even-handed enforcement of the federal conspiracy laws.

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[10] Indeed, it is interesting to note the explosion of Title VII court actions relative to those filed under the federal antitrust laws. Thus, in 1977, there were 5,931 district court cases filed under Title VII as compared with only 1,689 antitrust cases commenced in the federal district courts. See 1977 Annual Report of the Director, Administrative Office of the United States Courts, p. 100 (Table 20), and p. 112 (Table 25).

CONCLUSION

For these reasons, and those stated in the petition of the Association, *et al.*, we respectfully urge the Court to grant the petition herein and issue a writ of certiorari to the United States Court of Appeals for the Third Circuit.

Respectfully submitted,

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November, 1978

APPENDIX

IN THE

Supreme Court of the United States

October Term, 1978

No. 78-753

GREAT AMERICAN FEDERAL SAVINGS & LOAN ASSOCIATION, JOHN A. VIROSTEK, JOSEPH E. BUGEL, JOHN J. DRAVECKY, DANIEL T. KUBASAK, EDWARD J. LESKO, JAMES E. ORRIS, JOSEPH A. PROKOPOVITSH, JOHN G. MICENKO, and FRANK J. VANEK,

Petitioners,

v.

JOHN R. NOVOTNY,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

PETITION FOR CERTIORARI FILED NOVEMBER 6, 1978
CERTIORARI GRANTED JANUARY 8, 1979

INDEX.

NOTE

The opinion and order of the Court of Appeals for the Third Circuit is attached to the Petition for a Writ of Certiorari as Appendix A (Pet. App. A at 1a-66a). The opinion and order of the United States District Court for the Western District of Pennsylvania is attached to the Petition for a Writ of Certiorari as Appendix B (Pet. App. B at 67a-76a). They will not be reprinted in the Appendix.

APPENDIX A

Complaint

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

JOHN R. NOVOTNY,

Plaintiff,

vs.

GREAT AMERICAN FEDERAL SAVINGS & LOAN ASSOCIATION, JOHN A. VIROSTEK, JOSEPH E. BUGEL, JOHN J. DRAVECKY, DANIEL T. KUBASAK, EDWARD J. LESKO, JAMES E. ORRIS, JOSEPH A. PROKOPOVITSH, JOHN G. MICENKO and FRANK J. VANEK,

Defendants.

No. .....
JURY TRIAL DEMANDED

I. *JURISDICTION:*

1. The jurisdiction of this Court is founded upon Title 28 U.S.C. § 1343, relating to actions for deprivation of civil rights, and Title 42 U.S.C. § 2000e(5), relating to discrimination in employment.

II. *PARTIES:*

2. John R. Novotny, plaintiff, hereinafter called "Novotny," is an individual resident of Allegheny County, Pennsylvania.

3. Defendant, Great American Federal Savings and Loan, hereinafter called "GAF," known previously as First Federal Savings & Loan, is a mutual Federal Savings & Loan Association, organized and existing under Federal law and charter, for the purpose of promoting thrift and home ownership.

4. Defendant, John A. Virostek, is an individual who is presently Director Emeritus of GAF, and at times relevant hereto he was chairman of the Board of Directors of GAF and its Senior Solicitor.

5. Defendant, Joseph E. Bugel, is an individual who is presently Chairman of the Board of GAF, and at times relevant hereto was Vice-Chairman of the Board of GAF.

6. Defendant John J. Dravecky, is an individual who is and was at all times relevant hereto Vice-President of GAF.

7. Defendant, Daniel T. Kubasak, is an individual who is and was at all times relevant hereto President of GAF.

8. Defendant, Edward J. Lesko, is an individual who is a member of the GAF Board of Directors and at times relevant hereto was the junior solicitor of GAF.

9. Defendant, James E. Orris, is an individual who is a member of the Board of Directors of GAF, and was at times relevant hereto President of GAF.

10. Defendant, Joseph A. Prokopovitsh, is an individual who is presently and at all times relevant hereto, was a member of the Board of Directors of GAF.

11. Defendant, John G. Micenko, is an individual who is presently Executive Vice-President of GAF, and at times relevant hereto, was treasurer and secretary of GAF.

12. Defendant, Frank J. Vanek, is an individual who is presently Vice-President and Controller of GAF, and at times relevant hereto was Controller of GAF.

III. *FACTS:*

13. Novotny was hired by GAF on or about May 1, 1950, as a clerk, and subsequently became a loan officer, treasurer, secretary and member of the Board of Directors.

14. Novotny was terminated from his employment with GAF on January 22, 1975, and at the time of his termination of his employment, he was an undesignated employee, having not been re-elected secretary of the association at its annual meeting on January 22, 1975.

15. At the time of his termination, Novotny was earning $3,825.00 per month as an employee of GAF, and was an employee in good standing who would not have been terminated but for the matters set out below. In addition, Novotny earned $250.00 for each of twenty-six (26) meetings of the Board of Directors which he attended per year.

16. Beginning at times in the past, the exact dates of which are unknown to Novotny, but which began or continued after January 1, 1966, individual defendants, on behalf of GAF, intentionally and deliberately embarked upon and pursued a course of conduct the effect of which was to deny to female employees equal employment opportunity and, specifically, equal opportunity for promotion and advancement.

17. Said course of conduct was characterized by some or all of the following actions, *inter alia:*

(a) Promoting male employees with less experience, fewer years of service and less qualification over more qualified female employees;

(b) Providing education and training to male employees which was not provided to female employees;

(c) Making known to male employees job vacancies which were not made known to female employees;

(d) Evaluating male employees in accordance with different and subjective criteria than those applied to female employees;

(e) Categorizing certain jobs as "male" or "female" and promoting in accordance with these categories;

(f) Creating an atmosphere inimical to the asperations of female employees by subjecting all female employees to the supervision and control;

(g) By providing different and lesser degrees of fringe benefits to female employees than to male employees;

(h) By demoting qualified female employees and replacing them with less qualified male employees;

18. Said course of conduct constitutes an ongoing discrimination and continues to the present time.

19. During July, 1974, said course of conduct manifested itself in the demotion of a female employee, Betty Batis from a position of head teller to the position of savings counselor, and her replacement by a less qualified male employee.

20. As a result of said demotion, Betty Batis and several female employees of GAF made known to Defendant Kubasak their displeasure at the demotion and as well as the general employment practices of GAF which had indicated the existence of sex-based employment discrimination.

21. As a result of said protestations, Betty Batis was terminated from her employment, although she was subsequently rehired in a lower position after being required to submit a letter of apology to the individual defendants.

22. During a meeting of the Board of Directors, however, Novotny expressed his general support for the female employees who had made their protest and expressed various opinions with regard to the obligations of GAF in terms of employment discrimination and equal employment opportunity, and further indicated his refusal to support the majority decision on the Board of Directors with regard to the termination of Batis.

23. On or about January 22, 1975, at the annual meeting of the Association, Novotny was not re-elected as the secretary or member of the Board of Directors and further was terminated from his employment with GAF.

24. Said termination bore no relationship to the ability with which Novotny carried on his employment duties with GAF, but was solely the result of Novotny's support of the equal employment opportunity claims of the female employees of GAF and as well as the result of Novotny's expressed opinions in support of Batis and the other female employees, which opinions were made by Novotny in accordance with his rights under the Constitutions of the United States and the Commonwealth of Pennsylvania.

25. In addition, Novotny was terminated because of his known support for equal employment opportunity for women within the GAF organization.

26. In addition, the termination of Novotny resulted from an agreement and conspiracy by and among the individual

defendants to deprive Novotny of and to penalize him for the exercise of his constitutional rights to freedom of expression and association, particularly as said expression and associations involved the furtherance of equal opportunity employment for women.

27. In addition, Novotny was terminated because he was, in his position as an employee and secretary of the association and a member of the Board of Directors, in a position to affect actions and procedures to implement equal employment opportunities for women and to provide to female employees training, education and responsibilities equal to that of male employees.

IV. *CAUSES OF ACTION:*

28. The termination of Novotny was accomplished by the individual defendants in violation of Title 42, U.S.C. § 1985 relating to conspiracies to deprive individuals of their rights under the Constitution of the United States.

29. Further, the termination of Novotny was accomplished in violation of Title 42, U.S.C. § 2000e(5), relating to equal employment opportunities, pursuant to a pattern of practice of the individual defendants, on behalf of GAF, to discriminate against female employees in hiring, promotion and advancement.

30. As a result of the conspiracy by the individual defendants and the unlawful discriminatory patterns, Novotny was deprived of his income from January 22, 1975, and will be deprived of said income in the future.

31. As a further result of the conspiratorial and discriminatory actions of the individual defendants as aforesaid, Novotny suffered humiliation and embarrassment and his ability to obtain employment in the future as been severely curtailed and hampered.

32. As a further result of the conspiratorial and discriminatory actions of the individual defendants as aforesaid, Novotny has been required to engage in services of attorneys to gain redress for the damages done to him.

33. At all times relevant hereto, the individual defendants were and are acting on behalf of GAF.

V. *EXHAUSTION OF ADMINISTRATIVE REMEDIES:*

On or about January 29, 1975, Novotny filed a charge of discrimination with the Equal Employment Opportunity Commission and on the 9th day of December, 1976, he received from the Commission his right to file suit in accordance with the provisions of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e(5). Novotny has in all other respects complied with all applicable provisions of the law with regard to the exhaustion of his administrative remedies prior to the filing of suit.

WHEREFORE, Plaintiff requests this Honorable Court to:

(a) Enter judgment in favor of plaintiff and against the defendants, individually, jointly and severally, for an amount equal to the monetary damages suffered as a result of his unlawful termination;

(b) Enter judgment in favor of plaintiff and against the defendants, individually, jointly and severally for attorneys' fees and costs of suit;

(c) Enjoin defendants, individually and jointly from further acts of discrimination, and order the defendants to comply with applicable provisions of the law dealing with equal employment opportunity.

Respectfully submitted,

By STANLEY M. STEIN,
Stanley M. Stein, Esquire.

APPENDIX B

Answer On Behalf Of Defendant Great American Federal Savings & Loan Association

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA

JOHN R. NOVOTNY,

Plaintiff,

v.

GREAT AMERICAN FEDERAL SAVINGS & LOAN ASSOCIATION, JOHN A. VIROSTEK, JOSEPH E. BUGEL, JOHN J. DRAVECKY, DANIEL T. KUBASAK, EDWARD J. LESKO, JAMES E. ORRIS, JOSEPH A. PROKOPOVITSH, JOHN G. MICENKO and FRANK J. VANEK,

Defendants.

Civil Action No. 76-1580

In response to the instant Complaint, Defendant Great American Federal Savings & Loan Association (the "Association") respectfully answers as follows:

First Defense

The Complaint fails to state a claim against the Association upon which relief can be granted.

Appendix B—Answer On Behalf Of Defendant Great American Federal Savings & Loan Association.

Second Defense

1. The allegations of Paragraph 1 of the Complaint are conclusions of law to which no response is required.

2-13. The Association admits the allegations in Paragraphs 2 through 13 of the Complaint.

14. The Association admits that the Plaintiff was terminated from his employment with the Association and was not re-elected secretary of the Association on January 22, 1975. The Association denies that the Plaintiff was an undesignated employee at that time.

15. The Association admits that the Plaintiff was earning $3,825.00 per month at the time of his termination, and that the Plaintiff received $250.00 for each of the twenty-six meetings of the Board of Directors which he attended per year. All other allegations in Paragraph 15 are denied.

16-22. The Association denies the allegations in Paragraphs 16 through 22 of the Complaint.

23. The Association admits that Plaintiff was not re-elected as the secretary of the Association and was terminated from his employment on January 22, 1975. The Association denies that Plaintiff's position on the Board of Directors was terminated at that time.

24-32. The Association denies the allegations in Paragraphs 24 through 32 of the Complaint.

33. The Association is without knowledge or information sufficient to form a belief as to the truth of Plaintiff's allegations under the caption "Exhaustion of Administrative Remedies."

Third Defense

The Association has not intentionally engaged in any unlawful employment practice as alleged in the Complaint nor has it permitted any unlawful employment practice to occur.

Fourth Defense

The Association's employment practices and policies are non-discriminatory and are applied and administered in a non-discriminatory manner.

Fifth Defense

If the Association has instituted different terms, conditions, or privileges of employment, such differences are, or were, not the result of an intention to discriminate because of sex, but rather are, or were, instituted by the Association pursuant to a *bona fide* merit system, or a system which determines the terms, conditions or privileges of employment by quality of performance, experience, expertise, or other factors other than sex.

Sixth Defense

Rights of action alleged in the Complaint against the Association are barred because Plaintiff, as an officer and member of the Board of Directors, was *in pari dilecto* concerning actions taken by the Association toward female employees.

WHEREFORE, the Association requests that judgment be entered in its favor and against the Plaintiff, that the Complaint be dismissed, and that the Association be awarded costs of this action and reasonable attorneys' fees as authorized by 42 U.S.C. § 2000e-5(k).

Respectfully submitted,

EUGENE K. CONNORS,
Eugene K. Connors,

WALTER G. BLEIL,
Walter G. Bleil,

REED SMITH SHAW & McCLAY,
747 Union Trust Building,
Pittsburgh, Pennsylvania 15230,

Counsel for Defendant, Great American Federal Savings & Loan Association.

[Certificate of service omitted in printing]

APPENDIX C

Defendant Great American Federal Savings & Loan Association's Motion To Dismiss

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

JOHN R. NOVOTNY,

Plaintiff,

v.

GREAT AMERICAN FEDERAL SAVINGS & LOAN ASSOCIATION, JOHN A. VIROSTEK, JOSEPH E. BUGEL, JOHN J. DRAVECKY, DANIEL T. KUBASAK, EDWARD J. LESKO, JAMES E. ORRIS, JOSEPH A. PROKOPOVITSH, JOHN G. MICENKO and FRANK J. VANEK,

Defendants.

Civil Action No. 76-1580

Pursuant to Federal Rule of Civil Procedure 12(b)(6), Defendant Great American Federal Savings & Loan Association (the "Association") respectfully moves this Court to take the following action:

Appendix C—Defendant Great American Federal Savings & Loan Association's Motion to Dismiss.

1. To dismiss Plaintiff's allegation of a violation of 42 U.S.C. § 1985 for failure to state a cause of action in that:

a) No "conspiracy" existed because the decision to discharge the Plaintiff was admittedly made by the individual defendants in their capacity as officers and directors of the Association, and therefore reflected the judgment of a single business entity;

b) The allegations of the Complaint do not demonstrate the presence of an "invidiously discriminatory animus" directed toward a class to which the Plaintiff belongs; and

c) The rights of freedom of speech and association allegedly infringed by the conspiracy are not protected from the activities of individual persons;

2. To dismiss the allegation of jurisdiction under 28 U.S.C. § 1343 because Title VII of the Civil Rights Act of 1964, 42 U.S.C § 2000e-5 *et seq.* ("Title VII"), has an independent jurisdictional basis;

3. To dismiss the alleged violations by the individual persons named as defendants to this suit because those individuals were not named as respondents to the proceedings before the Equal Employment Opportunity Commission;

4. To dismiss the demand for a jury trial because a Title VII action is equitable in nature; and

5. To dismiss the allegations of violations of Title VII because the Plaintiff does not have standing to complain of discrimination against females.

Respectfully submitted,

EUGENE K. CONNORS,
Eugene K. Connors,

WALTER G. BLEIL,
Walter G. Bleil,

REED SMITH SHAW & McCLAY,
747 Union Trust Building,
Pittsburgh, Pennsylvania 15230,

Counsel for Defendant, Great American Federal Savings & Loan Association.

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

JOHN R. NOVOTNY,

Plaintiff,

v.

GREAT AMERICAN FEDERAL SAVINGS & LOAN ASSOCIATION, JOHN A. VIROSTEK, JOSEPH E. BUGEL, JOHN J. DRAVECKY, DANIEL T. KUBASAK, EDWARD J. LESKO, JAMES E. ORRIS, JOSEPH A. PROKOPOVITSH, JOHN G. MICENKO and FRANI J. VANEK,

Defendants.

Civil Action No. 76-1580

ORDER

AND NOW, this .... day of ....., 1977, upon consideration of the facts of record and arguments of counsel, it is hereby ordered, adjudged and decreed that judgment be entered in favor of defendant Great American Federal Savings & Loan Association against plaintiff John R. Novotny and that the Complaint be dismissed.

.....

By the Court

[Certificate of service omitted in printing]

In the Supreme Court of the United States

October Term, 1978

No. 78-753

GREAT AMERICAN FEDERAL SAVINGS & LOAN ASSOCIATION, JOHN A. VIROSTEK, JOSEPH E. BUGEL, JOHN J. DRAVECKY, DANIEL T. KUBASAK, EDWARD J. LESKO, JAMES E. ORRIS, JOSEPH A. PROKOPOVITSH, JOHN G. MICENKO, and FRANK J. VANEK,

Petitioners,

v.

JOHN R. NOVOTNY,

Respondent.

Brief in Opposition

JAY HARRIS FELDSTEIN
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QUESTIONS PRESENTED

1. Whether individuals who conspire to deprive others of federal rights and privileges can avoid liability by acting as members of the Board of Directors of a corporation.

2. Whether a conspiracy to deprive others of rights and privileges accorded them under Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e, may be the subject of an action under 42 U.S.C. §1985 (3).

3. Whether Congress has the constitutional authority to make illegal a conspiracy to deprive a class of persons of rights and privileges accorded to the class under commerce clause-based statutory law.

REASONS FOR NOT GRANTING THE WRIT

1. **While The Decision Below May Conflict With The Decisions Of Other Courts Of Appeals As To The Existence Of A Conspiracy For Purposes Of 42 U.S.C. §1985(3), The Decision Below In This Case Is The Correct Decision And Should Not Be Disturbed.**

Despite the fact that there is no support at all for their position in the language or history of 42 U.S.C. §1985(3), Petitioners contend that individuals who conspire to deprive others of rights and privileges of the laws are immune from liability for the harm they have done if they conspire in their capacities as corporate directors of a single corporation.

While Respondent concedes that the Third Circuit has decided this issue differently than other courts of appeals, Respondent also suggests that the Third Circuit is correct and those courts are wrong to the extent they have decided the matter differently. It seems to Respondent too clear for serious argument that when individuals conspire to violate a federal statute, it is irrelevant that they do so on behalf of a corporation.

Respondent contends that the cases which Petitioners cite to support their position are based entirely on faulty reasoning and proceed from a logic which suits the field of antitrust but should find no home in civil rights law.

In the leading case, *Dombrowski v. Dowling*, 459 F.2d 190 (7th Cir. 1972) a criminal lawyer who was refused office rental by a real estate corporation brought an action under §1985(3) claiming that the denial was based on the race and alienage of his clientele. The Seventh Circuit, reviewing the dismissal of his claim, held that an act of arbitrary business discrimination by a corporate landlord did not fall within the proscriptions of §1985(3) where it was a single business entity, although it represented the collective judgment of several individuals (three individual defendants), 459 F.2d at 196. *Dombrowski* has been cited with approval and followed in the Second Circuit in *Girard v. 94th Street and Fifth Avenue Corp.*, 530 F.2d 66 (2nd Cir. 1975) (assignee of lease charging cooperative apartment corporation with conspiring to discriminate on the basis of sex). The Fourth Circuit reached a similar result independently, *Bellamy v. Mason's Stores, Inc.*, 508 F.2d 504, 507-08 (4th Cir. 1974) (Boreman, J., concurring) (Ku Klux Klan member charging corporate employer with conspiracy to discharge).

Respondent contends, however, that the rationale of *Dombrowski* is faulty for the simple reason that the purposes underlying the proscriptions of antitrust law are substantially different than those supported by the civil rights acts.

Whereas two or more corporate officers or employees acting on behalf of a *single* business entity cannot accomplish the harm to be prevented by antitrust conspiracy law unless they involve another competing business entity, two or more corporate officers or employees acting on behalf of a single business entity *can* accomplish the harms to be prevented by civil rights law *without* involving another business entity.

A review of then Judge—now Justice—Stevens' opinion in *Dombrowski* must surely show its fallacy. Its antitrust conspiracy principles should no more be transplanted to civil rights law than they should be to criminal law. Cf. 18 U.S.C. §317; *U.S. v. Griffin*, 401 F.Supp. 1222 (D.C. Ind. 1975).

Respondent contends that *Dombrowski* must be narrowly circumscribed if it is to be accepted at all, but suggests that even its narrow holding is unsupported by logic or law. Judge Stevens' language in *Dombrowski* is, appropriately, quite tentative, and inconsistent:

> The conduct proscribed by the section is that of "two or more persons." In this case three persons were involved in the discriminatory act... Since only one firm was involved, and both Brennan and Dowling acted within the scope of their authority as agents for that firm, it is open to question whether the conspiracy requirement of §1985(3) has been met.
>
> • • •
>
> We...believe that the statutory requirement that "two or more persons...conspire to go in disguise on the highway" is not satisfied by proof that a discriminatory business decision reflects the collective judgment of two or more executives of the same firm. We do not suggest that an agent's action within the scope of his authority will always avoid a conspiracy finding. Agents of the Klan certainly could not carry out acts of violence with impunity simply because they were acting under orders from the Grand Dragon. But if the challenged conduct is essentially a single act of discrimination by a single business entity, the fact that two or more agents participated in the decision or in the act itself will normally not constitute the conspiracy contemplated by this Statute. Cf. *Morrison v. California*, 291 U.S. 82, 92, 54 S. Ct. 281, 78 L.Ed. 664. In this case we believe the evidence fails to

establish this element of a §1985(3) violation. 459 F.2d at 193, 196.

The concept of "business entity" discrimination created by Judge Stevens is completely and absolutely irrelevant to 42 U.S.C. §1985(3), which speaks in terms of "persons." There is not a single iota of support in §1985(3) for the proposition that individuals may insulate themselves from responsibility by conspiring as part of a "single business entity."

While Judge Stevens makes a brief and unexplained reference to the Ku Klux Klan, the logical extension of the *Dombrowski* decision is exactly that individual Klan members may escape the proscription of §1985(3) by incorporating or otherwise forming themselves into a single business entity.

The logic in this area of case law spawned by *Dombrowski* is filled with non-sequiturs. Analogy is usually attempted between §1985(3) and anti-trust cases, with *Nelson Radio and Supply Co. v. Motorola*, 200 F.2d 911 (5th Cir. 1952), *cert. denied*, 345 U.S. 925, 73 S. Ct. 783, 97 L.Ed 1356 (1953), frequently cited. Cf. *Johnson v. Baker*, 445 F.2d at 427. Although *Nelson Radio* did hold that a corporation, as a single entity, could not conspire with itself, that case must be read in the context of the antitrust laws. The purpose of the antitrust laws is to promote competition among business entities: a business entity cannot conspire with itself where it cannot compete with itself. Where competition may be restrained within the corporate structure, however, as with affiliated or vertically integrated corporations, such structure will not immunize the corporation from the antitrust laws. *United States v. Yellow Cab Co.*, 322 U.S. 218, 67 S. Ct. 1560, 91 L. Ed. 2010 (1947). As the Supreme Court of the United States warned in the *Yellow Cab* case, "the affiliation [of corporations] is assertedly one of the means of effectuating the illegal conspiracy not to compete." 322 U.S. at 229.

The Third Circuit has also noted that "common ownership or control of corporations does not insulate them from the antitrust laws," citing exceptions to the general rules. *Johnson v. Baker*, 445 F.2d at 427. The purpose of §1985(3) is to prohibit invidious conspiracies among individuals directed toward deprivation of constitutionally-protected rights. It is at the very first level of analysis (the legislative purpose) that the antitrust-civil rights analogy breaks down. For most antitrust violations under the Sherman Act conspiracy proscription, the corporation is considered as an individual which has conspired with another corporation. For civil rights purposes, each individual member of the corporation is capable of violating §1985(3) with any other individual or individuals.

Where the courts are willing to superimpose the business entity to bar a §1985(3) claim, they create an artificial immunity which favors form over substance. May future conspirators, acting with the exact intent meant to be curtailed by §1985(3), immunize their activity by forming corporations?

The *Dombrowski* decision itself foreshadowed the limits of its logic and specifically noted that its holding would not extend to all corporate activity. 459 F.2d at 193. It warned that members of the Klan could not successfully defend acts of violence on the basis that they were merely agents of the Grand Dragon. But, could those very same members, sitting on corporate boards of banks or real estate agencies, effect policies of employment discrimination or discrimination in housing by performing their functions as acts of collective business judgment?

There is absolutely no statutory or decisional support for the assertion that a single act of discrimination by officers or employees of a single business entity is outside the traditional concepts of conspiracy. The case cited by Judge Stevens in *Dombrowski*, *Morrison v. California*, involved

convictions of two individuals for conspiracy to violate the California Alien Land Law. On the page of that decision referenced by the *Dombrowski* court, the California court discusses the nature of conspiracy and the fact that it is impossible in the nature of things for a man to conspire with himself. The quantum leap from *Morrison* to *Dombrowski* is a difficult one to accept absent any bridge of support. The *Morrison* court is obviously talking about natural persons in a criminal indictment. *Morrison* contains not one iota of support for *Dombrowski's* startling and otherwise unsupported "business entity" proposition.

The reasoning of Judge Meskill in *Girard v. 94th Street and Fifth Avenue Corporation*, supra, is equally conclusory and devoid of rational basis.

Following *Dombrowski*, Judge Meskill asserts:

> Here there is but one single business entity with a managerial policy implemented by the one governing board, while at the University of Pennsylvania, each department had its own disparate responsibilities and functions so that the actions complained of by the plaintiff were clearly not actions of only one policy making body but of several bodies; thus the court correctly held that the allegations supported a claim of conspiracy among them. Here plaintiff's allegations of multiple acts by the directors are not alleged to be other than the implementation of a single policy by a single policy making body. 530 F.2d 66 at p. 71.

Respondent suggests, however, that the very nature of a conspiracy requires a "single policy" upon which the conspirators agree. Otherwise it would not be a conspiracy. *U.S. v. Butler*, 494 F.2d 1246 (10th Cir. 1974); *U.S. v. Kates*, 508 F.2d 308 (3rd Cir. 1975). Obviously, therefore, the fact that a "single policy" is arrived at is no reason to deny the existence of a conspiracy.

Respondent maintains that anti-trust principles of conspiracy are unique to that field and exist because of the limited business purposes of the anti-trust statutes, and that those principles should not be engrafted onto general conspiracy law in fields not specifically related to business enterprise.

The particular aim of the anti-trust conspiracy prohibition is set forth in cases such as *Nelson Radio and Supply Co. v. Motorola*, 200 F.2d 911 (5th Cir. 1952), in which Circuit Judge Borah noted, inter alia, at page 914:

> Surely discussions among those engaged in the management, direction and control of a corporation concerning the price at which the corporation will sell its goods, the quantity it will produce, the type of customers or market to be served or the quality of goods to be produced do not result in the corporation being engaged in a conspiracy in unlawful restraint of trade under the Sherman Act...
>
> The Act does not purport to cover a conspiracy which consists merely in the fact that the officers of the single defendant corporation did their day to day jobs in formulating and carrying out its managerial policy. The defendant is a corporate person and as such it can act only through its officers and representatives. It has the right as a single manufacturer to select its customers and to refuse to sell its goods to any one for any or no reason whatsoever. It does not violate the Act when it exercises it rights through its officers and agents, which is the only medium through which it can possibly act.

In other words, the officers and directors cannot be guilty of conspiring to do that which the corporation "as a *single* manufacturer" had the right to do in the conduct of its business. The analysis derives not from ascertaining the nature of a conspiracy, but solely from the business nature of the acts performed and decision made. The officers and

directors are not guilty of conspiracy not because they didn't "conspire," but because what they conspired to do was not illegal; that is, the harm to be prevented could not be accomplished by a single business entity.

As stated in *U.S. v. Colgate & Co.*, 250 U.S. 300, 39 S.Ct. 465, 63 C.Fd. 992 (1919):

> The purpose of the Sherman Act is...to preserve the right of freedom of trade. 250 U.S. at 307.

and as the 5th Circuit has recognized,

> It is fundamental that at least two independent *business entities* are required for violation of Section 1...*Six Twenty-Nine Productions, Inc. v. Rollins Telecasting, Inc.*, 365 F.2d 478 at 484 (emphasis added).

In the civil rights field, however, a single business entity *can* accomplish the discrimination or other civil rights harm to be protected against. The individual corporate officers are, by conspiring, capable of committing all of the acts contemplated under §1985(3).

Anti-trust conspiracy principles, therefore, should not be permitted to operate as one exception to normal conspiracy principles in the civil rights field. Natural persons *can* conspire, whether as corporate officers of a single business entity or not and there is absolutely no reason in law or logic why their corporate or business positions should insulate them when their conspiracies result in deprivations of civil rights.

Accordingly, Respondent urges this court to deny the petition of Great American Federal and the individual Petitioners on the ground that the Third Circuit Court of Appeals was correct in its apparently unanimous refusal to follow *Dombrowski v. Dowling*.

2. While The Decision Of The Third Circuit In The Instant Case May Conflict With The Decision Of The Fourth Circuit In *Doski v. Goldseker*, The Third Circuit's Decision Is The Correct One And Should Not Be Disturbed.

The basic premise underlying the position of Petitioners and the opinion in *Doski v. Goldseker*, 539 F.2d 1326 (4th Cir. 1976), must be that in the area of employment discrimination Title VII protects against all harms covered by §1985(3). Since, as the Third Circuit recognized, Title VII did not specifically repeal §1985(3), it could only be repealed by implication, and it can only be repealed by implication if Title VII makes 1985(3) superfluous. Petitioner recognizes that Title VII did not nullify any previously enjoyed substantive rights, but the real question is whether or not §1985(3) provides a remedy for a harm which Title VII does not provide.

One such harm, consistently recognized by law as particularly insidious, is the conspiracy. Conspiracies to engage in unlawful acts have traditionally been punished separately, and often more severely, from the unlawful acts themselves. *Clune v. U.S.*, 159 U.S. 590, 40 L.Ed. 269 (1895). Section 1985(3) would also be particularly useful where, as in the instant case, the persons conspiring may not fall within the definition of "employers" in the meaning of Title VII, §701, and may, therefore, not be subject to Title VII's proscriptions. Cf. *Foust v. Transamerica Corp.*, 391 F.Supp. 312 (D.C. Cal. 1975).

Respondent relies, in general, upon the reasoning of the Third Circuit's opinion in this matter beginning at page 36a of the Petition, but also points out that Petitioners' assertion of the consequences to flow from that opinion are unsupported by evidence.

Title VII's "emphasis on conciliation and administrative resolution" is not likely to be undermined at all since it is not practical to assume that many plaintiffs will proceed against individuals of questionable solvency without first exhausting Title VII remedies against a solvent business organization. Even if the business organization could be made liable for the conspiratorial acts of its agents, Petitioner has not suggested why complainants would bring their claims piecemeal or why they would be less willing to conciliate. Complainants might, no doubt, have another weapon in their arsenals in the event conciliation broke down, but why Complainants should have to negotiate from positions of less advantage Petitioners do not hint.

The fact that a plaintiff may have the benefit of a longer statute of limitations does not seem unfair in light of the fact that the action involves proof of a conspiracy—universally recognized as difficult to discover and prove because it frequently encompasses elements of concealment.

That actions under §1985(3) may involve a jury trial may be an advantage for a plaintiff—but only if one assumes that juries are more sympathetic to the claims of civil rights plaintiffs than judges, a proposition not supported by anything before the court.

If punitive damages can be awarded, it may be that plaintiffs have been successful in proving conspiracies characterized by intentional or perhaps malicious discriminations, in which case the policies to be served by §1985(3) are in fact served. The same argument can be made with regard to any elements of damage—including unlimited back pay—which may be awarded under §1985(3). Title VII recognizes that a compensable discrimination may not be intentional. *Boston Chapter NAACP, Inc. v. Beecher*, 504 F.2d 1017 (1st Cir. 1974), *cert. den.* 421 U.S. 910, 43 L.Ed.2d 775, 95 S.Ct. 1561; *Muller v. United States Steel Corp.*, 509 F.2d

923 (10th Cir. 1975), *cert. den.* 423 U.S. 825, 46 L.Ed.2d 41, 96 S.Ct. 39. Accordingly, it is not surprising that the damage provisions of Title VII are not punitive in nature.

Under §1985(3), plaintiffs must show that the conspiracy had as its purpose the invidious discrimination complained of. *Core v. Clemmons*, 323 F.2d 54 (5th Cir. 1963), *cert. den.* 375 U.S. 992, 11 L.Ed.2d 478, 84 S.Ct. 632. If such a purposeful discrimination is shown, who can say that a heavier penalty is not justified? Further, who can assume that a plaintiff will bypass the administrative process and opt for a significantly more difficult burden of proof? Such suggestions by Petitioners in the instant case, therefore, are unsubstantiated in fact, law or experience and dire predictions of open floodgates are simply insufficient to justify a review of the Third Circuit's opinion in the instant case.

3. The Decision Below Does Not Conflict With Any Statutory Analysis Developed By This Court.

The essence of the decision of the Third Circuit in that portion of its opinion beginning on page 42a of the Petition is simply that if Congress has the constitutional authority to enact a statute, it must, *ipso facto*, have the constitutional authority to prohibit with appropriate sanction a conspiracy to violate that statute. It is not necessary that the statute prohibiting the conspiracy have an independent constitutional base. Petitioners impliedly recognize this legal fact, but argue that the Third Circuit "never examined §1985(3) to determine whether Congress intended it to be such a statute." Respondent contends that the court did in fact examine §1985(3) and correctly found it to be such a statute.

As part of their argument, Petitioners claim—falsely, Respondent believes—that the Third Circuit's decision means that "a plaintiff can state a Title VII-based cause of action under §1985(3) against a corporate employer even

though that employer fails to meet the jurisdictional standards of Title VII because it does not sufficiently affect interstate commerce." Petitioners suggest that as a result, two or more agents of a corporation who conspire to deprive an employee of Title VII rights would be liable under §1985(3) even if the corporation had fewer than 15 employees. Exactly how employees of such a corporation would have Title VII rights in the first place, however, is not explained by Petitioners. Respondent would suggest that they wouldn't. If Congress has the power to regulate interstate commerce, and if a corporation with fewer than 15 employees does not, presumably, affect interstate commerce, then Congress has no power to outlaw discrimination in corporations with fewer than 15 employees. If Congress cannot outlaw such discrimination, it seems that employees of such corporations have no Title VII rights or privileges and it further seems that no conspiracy can be entered into to deprive them thereof.

The result which Petitioners call, on page 13 of their Petition, "unconstitutional" and "irrational" is exactly that, but it is reached by Petitioners, not by the Third Circuit.

Even if, however, §1985(3) is not the kind of statute which prohibits a conspiracy to violate any federal statute, §1985(3) is *clearly* the kind of statute which prohibits a conspiracy to violate an anti-discrimination statute such as Title VII. The opinion of this court in *Griffin v. Breckenridge*, 403 U.S. 88, quoting Representative Shellabarger, undoubtedly supports the proposition that in §1985(3) Congress intended to prevent "deprivations which shall attack the equality of rights of American citizens... and the *animus* and effect of which is to strike down the citizen, to the end that he may not enjoy equality of rights as contrasted with his and other citizens' rights...." 403 U.S. at 100.

In Title VII, Congress chose the commerce clause as a means of assuring equality of employment opportunity, at least to those persons employed by or seeking employment in business and other entities affecting interstate commerce. To the extent that Title VII is violated, persons are deprived of equality of rights as contrasted with other citizens' rights. Obviously, such a deprivation was within the power of Congress to prohibit and was almost certainly the kind of deprivation Congress could deal with through any of its other powers. The expansive language used by Schellabarger and quoted in *Griffin* also makes it clear that Congress intended to reach rights which might be created by Congress or the Constitution in the future and there is nothing from which it can be concluded that Congress intended to limit the effect of §1985(3) only to those rights then codified.

The "jurisdictional limitations" which Petitioners look for on page 13 of their petition are obviously contained in Title VII, and Respondent contends that Petitioners are wrong in asserting that the *Griffin* analysis requires §1985(3) itself to have a commerce clause foundation in order to remedy the violation of a commerce clause-based right—especially a right whose affinity for the §1985(3) motivation is so close.

CONCLUSION

For all of the foregoing reasons, respondents urge this Court to deny Petitioners' request for a review of the decision of the Third Circuit in the instant case.

Respectfully submitted,

FELDSTEIN GRINBERG
STEIN & McKEE

By _____
Jay Harris Feldstein, Esquire

CERTIFICATE OF SERVICE

The undersigner hereby certifies that on this 28th day of November, 1978, three copies of the within BRIEF IN OPPOSITION were mailed, postage prepaid, to John A. Wayman, Eugene K. Connors and Walter A. Bleil, c/o Reed Smith Shaw & McClay, 747 Union Trust Building, Pittsburgh, Pennsylvania 15219, Counsel for Petitioners, and that three copies were mailed postage prepaid to Douglas S. McDowell, c/o McGuiness & Williams, 1747 Pennsylvania Avenue, N.W., Washington, D.C. 20006, Counsel for *Amicus* Equal Employment Advisory Council. I further certify that all parties required to be served have been served.

JAY HARRIS FELDSTEIN
707 Law & Finance Bldg.
Pittsburgh, Pa. 15219

IN THE

Supreme Court of the United States

October Term, 1978

No. 78-753

GREAT AMERICAN FEDERAL SAVINGS & LOAN ASSOCIATION, JOHN A. VIROSTEK, JOSEPH E. BUGEL, JOHN J. DRAVECKY, DANIEL T. KUBASAK, EDWARD J. LESKO, JAMES E. ORRIS, JOSEPH A. PROKOPOVITSH, JOHN G. MICENKO, and FRANK J. VANEK,

Petitioners,

v.

JOHN R. NOVOTNY,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

BRIEF FOR PETITIONERS

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IN THE

Supreme Court of the United States

October Term, 1978

No. 78-753

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Petitioners,

v.

JOHN R. NOVOTNY,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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BRIEF FOR PETITIONERS

Opinions Below

The opinion of the court of appeals is reported at 584 F.2d 1235 (3d Cir. 1978) and is attached to the Petition for a Writ of Certiorari as Appendix A (Pet. App. A at 1a-66a).[1] The opinion of the District Court for the Western District of Pennsylvania is reported at 430 F. Supp. 227 (W.D.Pa. 1977), and is attached to the Petition for a Writ of Certiorari as Appendix B (Pet. App. B. at 67a-76a).

Jurisdiction

The judgment of the Court of Appeals for the Third Circuit *en banc* was entered on August 7, 1978. The Petition for a Writ of Certiorari was filed on November 6, 1978 and was granted on January 8, 1979. This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1254(1).

Questions Presented

1. Whether the officers and directors of a corporation, admittedly acting only on behalf of that corporation at all relevant times, can form a conspiracy for purposes of 42 U.S.C. § 1985(3)?

2. Whether an alleged violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, is a deprivation of "equal privileges and immunities" for purposes of 42 U.S.C. § 1985(3)?

[1] References to the Appendix to the Petition for a Writ of Certiorari will be made as (Pet. App. .... at ....) and references to the Appendix hereto will be made as (App. .... at ....), with appropriate appendix and page notations.

3. Whether the commerce clause of the Constitution of the United States provides a "source of congressional power" which makes an alleged conspiracy by a private employer to deny women the right to equal employment opportunity actionable under 42 U.S.C. § 1985(3)?

Statutory Provisions Involved

UNITED STATES CODE, TITLE 42

§ 1985. Conspiracy to interfere with civil rights

* * *

(3) Depriving persons of rights or privileges. If two or more persons in any State or Territory conspire or go in disguise on the highway or on the premises of another, for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws; or of equal privileges and immunities under the laws, or for the purpose of preventing or hindering the constituted authorities of any State or Territory from giving or securing to all persons within such State or Territory the equal protection of the laws; or if two or more persons conspire to prevent by force, intimidation, or threat, any citizen who is lawfully entitled to vote, from giving his support or advocacy in a legal manner, toward or in favor of the election of any lawfully qualified person as an elector for President or Vice-President, or as a member of Congress of the United States; or to injure any citizen in person or property on account of such support or advocacy; in any case of conspiracy set forth in this section, if one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages occasioned by such injury or deprivation, against any one or more of the conspirators.

Statement of the Case

Respondent John R. Novotny ("Novotny"), a former employee and director of corporate Petitioner, Great American Federal Savings and Loan Association ("Association"), instituted this suit in the United States District Court for the Western District of Pennsylvania on December 17, 1976.

In essence, Novotny alleges that the Association and the individual Petitioners, its directors and/or officers, violated Title VII of the Civil Rights Act of 1964 ("Title VII"), 42 U.S.C. § 2000e (1976), by discriminating against the Association's female employees in promotion opportunities and related aspects of employment (App. A at 3).

At an unspecified meeting of the Association's Board of Directors, Novotny allegedly protested on behalf of the Association's female employees. At the Association's annual meeting, on or about January 22, 1975, the Association and its directors and officers failed to reelect Novotny as an officer and terminated his employment. According to Novotny, the Association and its officers and directors took this action because of his equal employment protest. He alleges that this was in violation of 42 U.S.C. § 1985(3) (1976) and Section 704(a) of Title VII, 42 U.S.C. § 2000e-3(a).

The Association moved to dismiss Novotny's Complaint and, on April 22, 1977, the district court granted the Association's motion and entered an order dismissing the Complaint (Pet. App. B. at 76a).

In an opinion accompanying its April 22 order, the district court held that the only alleged act of discrimination which had affected Novotny was his termination by the directors and officers. In the district court's view, this action was not attributable to a conspiracy because the Complaint alleged

that "at all times relevant hereto, the individual defendants were and are acting on behalf of GAF" (App. A at 7, ¶ 33). The Section 1985(3) cause of action was, therefore, dismissed.

The district court also dismissed Novotny's Title VII cause of action grounded upon the retaliation language of 42 U.S.C. § 2000e-3(a). In the district court's view, this provision applied only to discrimination suffered by an individual because he or she "made a charge, testified, assisted, or participated in any manner in an investigation, proceeding or hearing" brought under Title VII. Novotny had never alleged that his termination was connected in any way with such enforcement proceedings. Novotny therefore was not a "person aggrieved" and not entitled to relief under Title VII (Pet. App. B at 74a).

An appeal followed the judgment of the district court. It was argued before a three judge panel of the United States Court of Appeals for the Third Circuit on February 16, 1978. It was later ordered that the parties file supplemental briefs, and the case was reargued before the circuit court *en banc* on May 11, 1978.

In an opinion and judgment issued on August 7, 1978, the Third Circuit reversed and remanded the judgment of the district court regarding both causes of action under Section 1985(3) and Title VII.

In reversing the dismissal of the cause of action under Section 1985(3), the Third Circuit held, among other things, that the directors and officers could form a conspiracy despite the allegations in the Complaint; a violation of the substantive rights conferred by Title VII may be remedied under Section 1985(3); and the commerce clause of the United States Constitution is the congressional source of power which makes a private conspiracy to deny women their right to equal employment opportunity actionable under Section 1985(3).

Summary of Argument

I. The civil conspiracy rule that a corporation cannot conspire with itself flows naturally from general corporate law principles. Under such principles a corporation is incapable of acting *except* through its agents and therefore cannot be a separate person conspiring *with* agents working on its behalf for purposes of a civil conspiracy.

Application of this rule has no effect upon the purpose underlying the civil conspiracy: to provide the victim with a more effective means of compensation for the harm suffered. A corporation is already vicariously liable for actions taken by its authorized agents through *respondeat superior.* There is consequently no need to reach collective actions of a corporation through civil conspiracy. To do so, in addition, ignores how a corporation operates and exposes federal courts to needless civil conspiracy litigation over virtually every corporate decision. Matters such as this can be adequately litigated through existing causes of action.

The theory underlying criminal conspiracy, on the other hand, is to *punish* individuals for entering an agreement to perform an unlawful act or lawful act by unlawful means. For that reason, conviction for criminal conspiracy requires *specific intent* to commit the offense. Since the individual motivation must be examined, a person is not shielded from criminal conspiracy liability because of a corporate position which he or she may occupy. Consistent with this, in a criminal conspiracy, an individual will not be presumed liable because he or she occupies a position which might have had some input into the harmful decision.

Specific intent, however, is not an element of a cause of action under 42 U.S.C. § 1985(3). *Griffin v. Breckenridge,* 403

U.S. 88, 102 n.10 (1971). Criminal conspiracy principles are, therefore, not applicable to allegations of civil conspiracy liability.

In addition, other purposes behind criminalization of the agreement are not satisfied in this case. The violation of Title VII alleged here could only be committed by the corporate "employer" through the acts of its agents. The collective action in this case, therefore, creates no greater potential threat to the public.

Despite these considerations, the Third Circuit applied criminal conspiracy principles in the decision below to find the officers and directors of the Association, who admittedly were working on behalf of the Association at all relevant times, capable of conspiring for purposes of Section 1985(3). The Third Circuit felt compelled to reach this strained result because it could not conceive of the corporate form shielding avowed racists from liability. This fear is groundless. The courts can always "pierce the corporate veil" to assess individual liability if the corporation is a sham or if it is organized for unlawful purposes.

Every other circuit court to consider this issue has dismissed the fears of the Third Circuit and applied the traditional civil conspiracy principle that a corporation cannot conspire with its agents for purposes of Section 1985(3).

II. Section 1985(3) originated as Section 2 of the Enforcement Act of 1871. This Act was intended to provide a federal forum for the vindication of the fundamental rights of citizens which the state courts could not or did not want to adequately protect in the Reconstruction South.

Section 1985(3), therefore, was not intended to protect rights conferred by statutes which provide for federal jurisdiction in their own terms. If, for instance, rights flowing from statutes

such as the Labor-Management Relations Act, the Equal Pay Act, and the Age Discrimination in Employment Act which provide for conditional federal jurisdiction can be enforced under Section 1985(3), numerous conflicts will result and the intent of Congress will be frustrated.

The decision below, however, determined that rights conferred by federal equal employment statutes may be asserted under Section 1985(3). The dangers presented by this interpretation are crystallized in the facts of this case where a violation of Title VII was alleged.

In Title VII, Congress created an administrative/judicial framework with the emphasis on informal conciliation of charges before litigation was necessitated. If the right to be free from sex discrimination in the private sector conferred by Title VII, and Title VII alone, may be enforced under Section 1985(3), the careful work of Congress will be negated.

The damage which the Third Circuit's interpretation will cause to Title VII is not mere speculation because enforcement of a Title VII right under Section 1985(3) is much more attractive. Under Section 1985(3) a plaintiff can avoid exhaustion of the administrative process, obtain a longer statute of limitations, request a jury trial, and sue for broader relief.

Based on these considerations, the Fourth Circuit has correctly rejected the interpretation of the Third Circuit and held that the Title VII enforcement mechanism is the exclusive remedy for rights conferred by that statute.

III. In *Griffin v. Breckenridge*, 403 U.S. at 104, this Court held that a "source of congressional power to reach the private conspiracy alleged by the complaint" must be identified in each case. In this case the Third Circuit identified the

commerce clause as the source of congressional power to reach the private conspiracy, which, in its view, is a conspiracy by a private employer to deprive the Association's female employees of equal employment opportunities.

The commerce clause, however, is not a source of power for 1985(3). Although Congress can impose "protective conditions" on the privilege of engaging in an activity which affects commerce, this Court has consistently required that the activities sought to be regulated have a substantial impact on interstate commerce, and, in addition, there must be evidence that Congress intended to protect interstate commerce through the imposition of such protective conditions. Neither requirement is satisfied when 1985(3) and its legislative history are examined.

Section 1985(3) stands in stark contrast to other statutes where Congress used the commerce clause as a source of power. The framers of 1985(3) set no parameters in it to determine whether a particular activity had a substantial effect on commerce. In addition the legislative history reveals no intent or need to protect interstate commerce through 1985(3).

Similarly, reliance by Novotny on the thirteenth and fourteenth amendments as the source of power to reach the private conspiracy is misplaced. The thirteenth amendment applies only to discrimination on the basis of race or color. It has nothing to do with discrimination on the basis of sex. The fourteenth amendment applies only where there has been at least some form of state involvement, which is absent here.

It is therefore clear that there is no source of congressional power to reach the private conspiracy alleged in this case.

ARGUMENT

In *Griffin v. Breckenridge*, 403 U.S. 88, 102-103 (1971), this Court listed the elements of a cause of action under 42 U.S.C. § 1985(3). These elements are:

> (1) a conspiracy
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> (2) for the purposes of depriving a person or class of persons of the equal protection of the laws or equal privileges and immunities under the law (that is, a conspiracy motivated by class-based discriminatory animus); and
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> (3) an overt act in furtherance of the conspiracy
>
> (4) by which one is injured in his person or property or deprived of having and exercising any right or privilege of a citizen of the United States.

A court, in addition, must identify "a source of congressional power to reach the private conspiracy alleged by the complaint." *Id.* at 104.

The instant Complaint, however, failed to allege the existence of a legally cognizable conspiracy; failed to allege a violation of a right cognizable under the statute, and failed to allege a violation of a right assertible against a private conspiracy under Section 1985(3). For these reasons the cause of action under Section 1985(3) should have been dismissed.

I. The Instant Complaint Fails To Plead The Existence Of A Legally Cognizable Conspiracy.

The language of 42 U.S.C. § 1985(3) mandates that "two or more persons" must "conspire" to deprive an individual of the equal protection of the laws or of equal privileges and immunities under the laws in order to establish a cause of action under that statute.

This requirement that "two or more persons" must conspire is redundant because "[i]t is basic in the law of conspiracy that you must have two persons or entities to have a conspiracy." *Nelson Radio & Supply Co. v. Motorola, Inc.*, 200 F.2d 911, 914 (5th Cir. 1952), *cert. denied*, 345 U.S. 925 (1953).[2]

The instant Complaint attempts to allege a conspiracy among the officers and directors of the Association to deprive Novotny of his rights under the Constitution of the United States, particularly his rights to free speech and association (App. A at 5, ¶ 26). But the Complaint further alleges that "[a]t all times relevant hereto, the individual defendants were and are acting on behalf of GAF [the Association]" (App. A at 7, ¶ 33).

Even with the truth of the conspiracy allegations assumed, therefore, the Complaint fails to plead the existence of the civil conspiracy required by Section 1985(3).

A. Officers And Directors Acting On Behalf Of A Corporation Cannot Form A Civil Conspiracy.

Although a corporation is a "person" for purposes of 42 U.S.C. § 1985(3), it is a person with very special characteristics. As Chief Justice Marshall noted:

> A corporation is an artificial being, invisible, intangible, and existing only in contemplation of law. Being the mere creature of law, it possesses only those properties which the charter of its creation confers upon it, either expressly or as incidental to its very existence. These are such as are supposed best calculated to effect the object for which it was created. Among the most im-

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[2] The Court of Appeals for the Third Circuit acknowledged this fundamental requirement in the decision below when it stated that a conspiracy "requires a plurality of legal personalities as one of its elements" (Pet. App. A at 51a).

> portant are immortality, and, if the expression may be allowed, individuality; properties *by which a perpetual succession of many persons are considered as the same, and may act as a single individual.* They enable a corporation to manage its own affairs, and to hold property, without the perplexing intricacies, the hazardous and endless necessity, of perpetual conveyances for the purpose of transmitting it from hand to hand. It is chiefly for the purpose of clothing bodies of men, in succession, with these qualities and capacities, that corporations were invented, and are in use. By these means, a perpetual succession of individuals are capable of acting for the promotion of the particular object, like one immortal being.

Trustees of Dartmouth College v. Woodward, 17 U.S. (4 Wheat.) 518, 636 (1819) (emphasis added).

A corporation is an artificial person which can only act through its officers, directors, and other agents.[3] Any corporate decision therefore involves a multiplicity of officers, directors or agents acting as one person.

When corporate decisions intentionally or unintentionally ran afoul of the law, courts, faced with the choice of going behind the corporate personality to reach the actual individuals involved or holding the corporate entity liable for the unlawful acts, held the corporate entity liable.[4]

[3] *Dorsey v. Chesapeake and Ohio Railway Co.*, 476 F.2d 243 (4th Cir. 1973) (*per curiam*); *Pearson v. Youngstown Sheet and Tube Co.*, 332 F.2d 439, 442 (7th Cir.), *cert. denied*, 379 U.S. 914 (1964). In the decision below the Third Circuit attempts to draw a semantic distinction between conspiracies where the corporation is alleged to be a participant along with its officers and directors and conspiracies where only the officers and directors are allegedly participants (Pet. App. A at 52a). Since a corporation can act only through its officers, directors, and other agents, the attempted distinction is meaningless. The instant Complaint clearly alleged that, at all relevant times, the officers and directors were working on behalf of the Association (App. A at 7, ¶33).

The principle of vicarious liability known as *respondeat superior* made this choice reasonable and logical. Under that principle, responsibility for a harmful act by a corporate agent, no matter how lowly ranked, is automatically imputed to the corporation itself. The principle evolved from a need to provide victims with more effective means of redress.[5] Victims of corporate agents can proceed under this principle against a corporation, which is more likely to have assets to satisfy the harm than its agents.[6] The victim otherwise would be limited to the individuals responsible and complete redress might be impossible. 1 *Cooley on Torts* § 70 at 221 (4th ed. 1932).

[4] *See* W. Cary, *Corporations* at 109 (4th ed. 1969).

[5] The economic rationale behind this principle has been described as follows:

> What has emerged as the modern justification for vicarious liability is a rule of policy, a deliberate allocation of a risk. The losses caused by the torts of employees, which as a practical matter are sure to occur in the conduct of the employer's enterprise, are placed upon that enterprise itself, as a required cost of doing business. They are placed upon the employer because, having engaged in an enterprise which will, on the basis of all past experience, involve harm to others through the torts of employees, and sought to profit by it, it is just that he, rather than the innocent injured plaintiff, should bear them; and because he is better able to absorb them, and to distribute them, through prices, rates or liability insurance, to the public, and so to shift them to society, to the community at large.

W. L. Prosser, *Torts* § 69 at 459 (4th ed. 1971) (footnotes omitted).

[6] Courts, of course, can and do "pierce the corporate veil" to hold individuals liable in those relatively rare instances where a corporation has been formed with few, if any, assets for the purpose of shielding individuals from liability. *See* discussion *infra* at 22-24.

Civil conspiracies involving a corporation and its agents presented a similar choice of recognizing collective corporate action as the action of one, or more than one, person.

The purpose of civil conspiracy liability is not to punish individuals for their agreement to achieve an unlawful end or a lawful end by unlawful means. Instead, its purpose is to compensate for the resulting injury. For this reason, the focus of the civil conspiracy rationale is not on the *agreement* to conspire, but on compensating for the unlawful and/or harmful *results* of the overt acts in furtherance of the conspiracy.

In the normal situation not involving a corporation, a person who has suffered harm from an overt act in furtherance of a civil conspiracy can seek compensation under a civil conspiracy cause of action from individuals who *indirectly* or *directly* participated in the overt act. W. L. Prosser, *Torts* § 46 at 293 (4th ed. 1971). In this manner the victim is afforded the best opportunity to recover fully for the harm suffered.

Where a corporation and its agents have caused a harmful act, however, a different rule has been applied: a corporation cannot conspire with itself or its agents. *Nelson Radio, supra,* 200 F.2d at 914. This rule recognizes that a corporation can act *only* through its agents and not in and of itself. Collective action by its agents acting on its behalf is therefore not a conspiracy, since only one "person" is acting.

The civil conspiracy rule that a corporation cannot conspire with itself is therefore a logical extension of the general corporate law principle that a corporation can act only through its agents. If a corporation can only act through its agents, it is incapable of acting and conspiring independently of them. Due to a corporation's vicarious liability for its agents' acts, the civil conspiracy's purpose of providing the most effective relief for victims is also effectuated, albeit in a

different manner. No reason consequently exists to fictionalize corporate decisions, many if not all of which are necessarily collective, as civil conspiracies involving more than one person.

In contrast, a rule that a corporation can conspire with its agents ignores reality, contradicts and undercuts the "alter ego" corporate law principle and opens federal courts to civil conspiracy litigation needlessly duplicative of causes of action which already provide adequate means of relief.

To provide this greater source of compensation and avoid the multitude of problems created by a contrary rule, courts have consistently held that the activities of officers, directors and other agents on behalf of their corporation cannot give rise to a civil conspiracy.

In *Dorsey v. Chesapeake and Ohio Railway Co.*, 476 F.2d 243 (4th Cir. 1973) (*per curiam*), for example, agents of the defendant corporation allegedly conspired to wrongfully discharge the plaintiff and deny him due process. The Fourth Circuit, however, affirmed the dismissal of the conspiracy allegation as follows:

> Since a corporation can act only through its agents, the effect of Dorsey's charge of conspiracy between the defendant Railway Company and its agents was to charge a conspiracy by a single party.

476 F.2d at 245-46.[7]

[7] *Accord: Worely v. Columbia Gas*, 491 F.2d 256 (6th Cir. 1973), *cert. denied*, 417 U.S. 970 (1974) (conspiracy to maliciously prosecute); *Pearson v. Youngstown Sheet and Tube Co.*, 332 F.2d 439 (7th Cir.), *cert. denied*, 379 U.S. 914 (1964) (conspiracy to interfere with employment contract); *Zelinger v. Uvalde Rock Asphalt Co.*, 316 F.2d 47 (10th Cir. 1963) (conspiracy to interfere with distributorship contract); *Friendship Medical Center, Ltd. v. Space Rentals*, 62 F.R.D. 106 (N.D. Ill. 1974) (conspiracy to defraud); *Koehring Co. v. National Automatic Tool Co.*, 257 F. Supp. 282 (S.D. Ind. 1966), *aff'd*, 385 F.2d 414 (7th Cir. 1967) (conspiracy to appropriate trade secrets).

Similarly, courts have consistently recognized that agents of a corporation cannot form a civil conspiracy punishable by statute. *E.g., Nelson Radio, supra* (conspiracy to violate anti-trust laws); *Dombrowski v. Dowling*, 459 F.2d 190 (7th Cir. 1972) (conspiracy to violate Section 1985(3)).[8]

Individual officers, directors and agents working on behalf of their corporation, therefore, cannot engage in a civil conspiracy at common law or by statute.

B. Criminal Conspiracy Principles Are Not Applicable Under Section 1985(3).

In the decision below the Court of Appeals for the Third Circuit found that the officers and directors of a corporation could form a conspiracy. The reasoning behind this conclusion, however, was based solely on cases finding individual officers and directors guilty under a *criminal* conspiracy theory.[9]

Unlike civil conspiracy, which attempts to *compensate* the victim for his injury, criminal conspiracy seeks to *punish the individuals* who have agreed to take an unlawful course of conduct. The gravamen of the offense of criminal conspiracy

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[8] The application of this principle to cases arising under Section 1985(3) will be discussed in much more detail *infra* at 21-24.

This principle, of course, only applies as long as the officers, directors, or agents are acting on the corporation's behalf. *Johnston v. Baker*, 445 F.2d 424 (3d Cir. 1971). Acts which are personally motivated cannot be imputed to the corporation (W. L. Prosser, *Torts* § 70 at 461 (4th ed. 1971)), and the victim of the unlawful act must seek his remedy from the individual actor and any person conspiring with him.

[9] The Third Circuit relied exclusively on cases decided under the federal criminal conspiracy statutes, primarily 18 U.S.C. §§ 241, 242, and 371. *E.g., Pennsylvania R. R. System & Allied Lines, Fed. No. 90 v. Pennsylvania R. R. Co.*, 267 U.S. 203 (1925); *Mininsohn v. United States*, 101 F.2d 477 (3d Cir. 1939).

is the *agreement* itself. *Wilkins v. United States*, 376 F.2d 552 (5th Cir. 1967), *cert. denied*, 389 U.S. 964 (1967); *United States v. Fruit*, 507 F.2d 194 (6th Cir. 1974). Since no act resulting in harm to an individual is required to commit this offense, criminal conspiracy is often labelled a "mental" crime.[10]

As a result, one element of the offense of criminal conspiracy is specific intent. *United States v. Guest*, 383 U.S. 745 (1966). In terms of 18 U.S.C. § 241, the criminal analogue of Section 1985(3), this means specific intent to interfere with the federal rights in question. *Anderson v. United States*, 417 U.S. 211 (1974).[11]

Liability under a criminal conspiracy theory, therefore, is imposed on a strictly individualized basis. Each participant must have the requisite intent to commit the offense, and an individual is never presumed liable because of a position which he or she occupies. At the same time an individual is not permitted to avoid criminal liability for such intent because of a position which he or she occupies. *See Pennsylvania R. R. System, supra.*

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[10] *See* P. Marcus, *Criminal Conspiracy: The State Of Mind Crime-Intent, Proving Intent, and Anti-Federal Intent*, 1976 U. of Ill. L.F. 627 (1976); I. Dennis, *The Rationale of Criminal Conspiracy*, 93 Law Q. Rev. 39 (1977).

[11] 18 U.S.C. § 241 provides as follows:

> If two or more persons conspire to injure, oppress, threaten, or intimidate any citizen in the free exercise or enjoyment of any right or privilege secured to him by the Constitution or laws of the United States, or because of his having so exercised the same; or
>
> If two or more persons go in disguise on the highway, or on the premises of another, with intent to prevent or hinder his free exercise or enjoyment of any right or privilege so secured—
>
> They shall be fined not more than $10,000 or imprisoned not more than ten years, or both; and if death results, they shall be subject to imprisonment for any term of years or for life.

This specific intent analysis, however, is not applied when a civil conspiracy is charged. In the case of Section 1985(3), this Court has held that:

> The motivation requirement introduced by the word "equal" into the portion of § 1985(3) before us must not be confused with the test of "specific intent to deprive a person of a federal right made definite by decision or other rule of law" articulated by the plurality opinion in *Screws v. United States*, 325 U. S. 91, 103, for prosecutions under 18 U.S.C. § 242. Section 1985(3), unlike § 242, contains no specific requirement of "wilfulness." Cf. *Monroe v. Pape*, 365 U.S. 167, 187. The motivation aspect of § 1985(3) focuses not on scienter in relation to deprivation of rights but on invidiously discriminatory animus.

Griffin v. Breckenridge, 403 U.S. 88, 102 n.10 (1971).

There is no requirement of specific intent because a Section 1985(3) conspiracy is a civil conspiracy intended to remedy the harm suffered by an individual because that individual is a member of a definable group.[12] Accordingly, under Section

[12] In *Griffin, supra*, this Court reserved the question of whether Section 1985(3) encompasses any class-based animus other than racial bias. 403 U.S. at 102 n.9. The Third Circuit held that sex is a class for purposes of Section 1985(3) because sex is a "suspect classification" in light of this Court's decision in *Frontiero v. Richardson*, 411 U.S. 677 (1973). (Pet. App. A at 17a). *But see Stanton v. Stanton*, 421 U.S. 7 (1975); *Weinberger v. Weisenfield*, 420 U.S. 636 (1975); *Schlesinger v. Ballard*, 419 U.S. 498 (1975). No other circuit has ruled on application of Section 1985(3) to sex-based classes.

The Third Circuit also expanded the concept of standing under Section 1985(3) to include those who merely advocate the rights of members of the class subjected to the discrimination (Pet. App. A at 20a). *See also Richardson v. Miller*, 446 F.2d 1247 (3d Cir. 1971). *But see Hahn v. Sargent*, 523 F.2d 461, 469 (1st Cir. 1975), *cert. denied*, 425 U.S. 904 (1976); *Arnold v. Tiffany*, 487 F.2d 216 (9th Cir. 1973), *cert. denied*, 415 U.S. 984 (1974); *DesVergnes v. Seekonk Water District*, 448 F. Supp. 1256 (D. Mass. 1978).

1985(3), there is no automatic need to pierce the corporate veil to punish the individual agents responsible for the harm, and no satisfactory manner of determining each agent's invidiously discriminatory animus and resultant responsibility.[13] Holding only the corporation liable is, therefore, necessary and sufficient.

In addition, application of a criminal conspiracy theory in this case would not meet other purposes behind the development of that theory either. The basic evils which criminalization of conspiracy is designed to prevent were summarized by Justice Frankfurter in *Callanan v. United States*, 364 U.S. 587, 593-594 (1961), as follows:

> [C]ollective criminal agreement—partnership in crime—presents a greater potential threat to the public than individual delicts. Concerted action both increases the likelihood that the criminal object will be successfully attained and decreases the probability that the individuals involved will depart from their path of criminality. Group association for criminal purposes often, if not normally, makes possible the attainment of ends more complex than those which one criminal could accomplish. Nor is the danger of a conspiratorial group limited to the particular end toward which it has embarked. Combination in crime makes more likely the commission of crimes unrelated to the original purpose for which the group was formed. In sum, the danger which a conspiracy generates is not confined to the substantive offense which is the immediate aim of the enterprise.

[13] One of the primary dangers in applying criminal conspiracy principles under Section 1985(3) is that an individual may be liable because he or she occupies a position which might have had some input into the "harmful" decision. In this case, for example, liability could be imputed to an officer or director because he voted to terminate Novotny. Since his motivation will never be examined under Section 1985(3), however, we will never know whether he voted to further an unlawful purpose.

The distinction between this case and a criminal conspiracy case is that, individually, the corporate officers and directors could not violate Title VII. Only the corporation, the "employer," could succeed in depriving the class of its Title VII rights, since it is only the corporation's conduct and employment practices which are regulated by Title VII. 42 U.S.C. § 2000e-2(a). The fact that a number of officers are involved in a corporate decision to violate Title VII does *not* increase the potential harm to the public. The likelihood that the corporation will "succeed" in violating Title VII is not increased by the number of individual officers and directors involved in the decision. The "group association" by the corporate officers and directors would not increase the complexity of the Title VII violation. The combined decision of the corporate officers and directors does not make it more likely that the corporation will violate laws other than Title VII. In other words, *none* of the increased evils cited by Justice Frankfurter as justification for the existence of the criminal conspiracy offense are present where officers and directors of the same corporation combine in a decision for that corporation to violate Title VII.[14]

[14] It should also be noted that the Third Circuit interpreted Novotny's allegations to reach the conclusion that a conspiracy to violate Title VII rights existed. The charge which Novotny filed with the EEOC, however, alleged that *only* the Association violated Title VII (Novotny's EEOC charge appears in the record as Exhibit A to the Reply Memorandum in support of the Association's Motion to Dismiss). Novotny had the opportunity to allege such a violation by his employer "and any agents." 42 U.S.C. § 2000e(b). He chose not to name the officers and directors as Respondents to the charge, and a federal court would not have jurisdiction over those individual officers and directors in a Title VII action. *Le Beau v. Libby-Owens Ford Co.*, 484 F.2d 798 (7th Cir. 1973); *Mickel v. South Carolina State Employment Service*, 377 F.2d 239 (4th Cir. 1967), *cert. denied*, 389 U.S. 877 (1967). Consequently, the individual officers and directors here can only be charged with a violation of Title VII under the skewed interpretation of Section 1985(3) by the Third Circuit.

A violation of Section 1985(3), therefore, should not be founded on principles of criminal conspiracy. Specific intent is not required under Section 1985(3). Consequently, "piercing the corporate veil" is unjustified and unnecessary. The Court of Appeals for the Third Circuit, therefore, erred in its reliance on criminal conspiracy principles.

C. Officers And Directors Working On Behalf Of The Corporation Cannot Form A Conspiracy Under 42 U.S.C. § 1985(3).

When distinctions between civil and criminal conspiracies are analyzed, it is understandable that every other circuit court to consider the issue has ruled that officers and directors of a corporation cannot form a conspiracy for purposes of Section 1985(3).

In *Dombrowski v. Dowling*, 459 F.2d 190, 196 (7th Cir. 1972), the plaintiff had alleged a conspiracy by a corporation and one of its officers to deprive plaintiff of his first amendment right to free association by refusing to rent him office space because his clients were black and Spanish-speaking. The district court, on summary judgment, ruled in plaintiff's favor on the Section 1985(3) count.

Speaking for the circuit court, Judge (now Mr. Justice) Stevens reversed the judgment for the following reason:

> We also believe that the statutory requirement that "two or more persons . . . conspire or go in disguise on the highway," is not satisfied by proof that a discriminatory business decision reflects the collective judgment of two or more executives of the same firm. We do not suggest that an agent's action within the scope of his authority will always avoid a conspiracy finding. Agents of the Klan certainly could not carry out acts of violence with impunity simply because they were acting under orders from the Grand Dragon. But if the challenged conduct is essentially a single act of dis-

> crimination by a single business entity, the fact that two or more agents participated in the decision or in the act itself will normally not constitute the conspiracy contemplated by this statute. Cf. *Morrison v. California*, 291 U.S. 82, 92, 54 S. Ct. 281, 78 L.Ed. 664. In this case we believe the evidence fails to establish this element of a § 1985(3) violation.

459 F.2d at 196. *Accord: Girard v. 94th Street & Fifth Avenue Corp.*, 530 F.2d 66, 70-72 2d Cir. 1976), *cert. denied*, 425 U.S. 974 (1976); *Herrmann v. Moore*, 576 F.2d 453, 459 (2d Cir. 1978), *cert. denied*, 47 U.S.L.W. 3391 (Dec. 5, 1978); *Bellamy v. Mason's Stores, Inc.*, 508 F.2d 504, 508 (4th Cir. 1974); *Fallis v. Dunbar*, 532 F.2d 1061 (6th Cir. 1976) (*per curiam*); *Baker v. Stuart Broadcasting Co.*, 505 F.2d 181, 183 (8th Cir. 1974). *See also McLellan v. Mississippi Power & Light Co.*, 545 F.2d 919, 940 (5th Cir. 1977) (*en banc*) (dissenting opinion).

In the decision below, however, the Third Circuit specifically declined to "follow the line of cases adopting the rule that concerted action among corporate officers and directors cannot constitute a conspiracy under § 1985(3)" (Pet. App. A. at 55a).

The reasoning behind the Third Circuit's decision is difficult to grasp.[15] The court did express some fear that the corporate form should not be used to shield "the agreement of three partners to use their business to harass any blacks who register to vote" (Pet. App. A at 51a). These fears, however, are groundless.

In *Dombrowski*, the court noted that the corporate form will not always shield the agent's activities. 459 F.2d at 196.

[15] The fact that the Third Circuit had to justify its decision by applying criminal conspiracy principles to the civil conspiracy alleged in the Complaint has already been discussed.

In *Cole v. University of Hartford*, 391 F. Supp. 888 (D. Conn. 1975), Judge Blumenfeld elaborated on this point as follows:

> Perhaps the best explanation for this dicta in *Dombrowski* is that the law will not let those who would otherwise fall afoul of § 1985(3) avoid its effects by forming a corporation. In other words, conspirators may not create a principal for whom they are agents in order to make their acts all the acts of a single legal person that cannot be charged with conspiring with itself. This "piercing the veil" notion is more satisfying than a distinction based on the presence of violent acts, for it comports with well-recognized principles from other areas of the law. *See, e.g.*, Anderson v. Abbot, 321 U.S. 349, 361-363, 64 S.Ct. 531, 88 L.Ed. 793 (1944); Minton v. Cavaney, 56 Cal. 2d 576, 15 Cal.Rpter. 641, 364 P.2d 473 (1961)(en banc) (Traynor, J); W. Cary, Cases and Materials on Corporations 109-49 (4th ed. unabr. 1969). Neither this reading nor the "violence" reading gives succor to the plaintiff in this case, however. The University of Hartford was obviously not incorporated in order to prepetuate racial discrimination; the complaint alleges no violence done to the plaintiff.

391 F. Supp. at 893 (footnotes omitted).[16]

[16] State courts have often noted that a corporation cannot be formed for unlawful purposes:

> In contemplation of law, a corporation is a legal entity, an ideal person, separate from the real persons who compose it. This fiction, however, is limited to the uses and purposes for which it was adopted—convenience in the transaction of business and in suing and being sued in its corporate name, and the continuance of its rights and liabilities, unaffected by changes in its corporate members. A corporation cannot be formed for the purpose of accomplishing a fraud or other illegal act under the disguise of the fiction; and, when this is made to appear, the fiction will be disregarded by the courts, and the acts of the real parties dealt with as though no such corporation had been formed, on the ground that fraud vitiates everything into which it enters, including the most solemn acts of men.

First Nat. Bank v. Trebein Co., 59 Ohio 316, 52 N.E. 834 (1898).

Thus, the corporate veil can always be pierced to prevent injustices resulting from the incorporation of individuals with avowedly discriminatory purposes such as the Ku Klux Klan.

The fact remains, however, that the Association was undisputedly not formed to foster sex discrimination. It is unnecessary to pierce the corporate veil in this instance.[17] Furthermore, there is no dispute that the officers and directors were working on behalf of the corporation. The Complaint alleged as much (App. A at 7, ¶33).

Under these circumstances, therefore, the Complaint failed to allege the existence of a conspiracy for purposes of Section 1985(3) as a matter of law.

II. A Violation Of Title VII Cannot Constitute A Deprivation Of Equal Protection Or Equal Privileges And Immunities Under The Laws For Purposes Of 42 U.S.C. § 1985(3).

Section 1985(3) provides a remedy for deprivations of "the equal protection of the laws and equal privileges and immunities under the laws." In *Griffin v. Breckenridge*, 403 U.S. 88, 102 (1971), this Court determined that the word "equal" requires that the deprivation of right be motivated by "class-based, invidiously discriminatory animus."

The parameters of the "rights" protected by Section 1985(3), however, were not delineated by the *Griffin* Court.[18]

[17] The Association obviously does not contend that its corporate form shields it from liability for sex discrimination which might have occurred as a result of its employment practices and policies. The remedy for such discrimination, however, lies under Title VII, not 42 U.S.C. § 1985(3).

[18] The complaint in *Griffin* alleged violations of fundamental rights of citizenship flowing from the Constitution and the Bill of Rights— "rights such as free speech, assembly, association, and movement." 403 U.S. at 103. The Court discussed the case in terms of violations of rights flowing from the thirteenth amendment and the right to interstate travel.

As a result, courts have had widely disparate interpretations regarding the scope of the rights which may be asserted in a Section 1985(3) cause of action.

In the decision below the Third Circuit interpreted the statute to encompass rights conferred by federal law,[19] and, in this particular case, the "deprivation of a right secured by a federal statute guaranteeing equal employment opportunity" (Pet. App. A at 28a).[20]

This broad interpretation of Section 1985(3), however, far exceeds its legislative purpose and undermines the administrative framework of federal equal employment statutes and, by extension, other laws.

A. Section 1985(3) Was Intended To Protect Fundamental Rights Of Citizenship For Which No Federal Jurisdiction Was Available.

The present text of 42 U.S.C. § 1985(3) originated in Section 2 of the Enforcement Act of 1871 (Act of April 20, 1871, ch. 22, 17 Stat. 13), more popularly known as the "Ku Klux Klan

[19] The Third Circuit did qualify its interpretation by stating that it did not have to consider whether the rights conferred by *all* federal statutes may be enforced under Section 1985(3) (Pet. App. at 28a), but it is difficult to determine where the circuit court would draw the line. Carried to its logical conclusion, under the Third Circuit's opinion rights conferred by *all* federal statutes would be actionable.

[20] The Complaint specifically alleged that the conspiracy deprived Novotny of "his constitutional rights to freedom of expression and association" (App. A at 5-6, ¶26). These rights, however, can only be deprived by the federal government in contravention of the first amendment and the states in contravention of the fourteenth amendment. The Third Circuit refused to consider whether a deprivation of such rights could be remedied under Section 1985(3) because the allegations regarding the Title VII violation were found sufficient to plead a cause of action under Section 1985(3) (Pet. App. A at 31a, n. 61). Section 1985(3) cannot remedy the deprivation of first or fourteenth amendment rights, however, without an allegation of state action. See discussion *infra* at 48-51.

Act." As this Court recognized in *Monroe v. Pape*, 365 U.S. 167 (1961):

> This Act of April 20, 1871, sometimes called 'the third force bill,' was passed by a Congress that had the Klan 'particularly in mind.' The debates are replete with references to the lawless conditions existing in the South in 1871. There was available to the Congress during these debates a report, nearly 600 pages in length, dealing with the activities of the Klan and the inability of the state governments to cope with it. This report was drawn on by many of the speakers.

365 U.S. at 174 (footnotes omitted).

As a result of lawlessness and the inability or refusal of the Southern states to cope with it, Congress created a civil remedy in Section 1 of the 1871 Act which is now codified as 42 U.S.C. § 1983, against those "who representing a State in some capacity were *unable* or *unwilling* to enforce a state law." 365 U.S. at 176 (emphasis the Court's).

In Section 2 of the Act, however, Congress provided a penal remedy against individual Klan members who violated a person's constitutional rights by activity considered a federal crime. Consequently, the text of Section 2 as reported on the floor of the House was as follows:

> "That if two or more persons shall, within the limits of any State, band, conspire, or combine together to do any act in violation of the rights, privileges, or immunities of any person, to which he is entitled under the Constitution and laws of the United States, which, committed within a place under the sole and exclusive jurisdiction of the United States, would, under any law of the United States then in force, constitute the crime of either murder, manslaughter, mayhem, robbery, assault and battery, perjury, subornation of perjury, criminal obstruction of legal process or resistance of officers in discharge

> of official duty, arson, or larceny, and if one or more of the parties to said conspiracy or combination shall do any act to effect the object thereof, all the parties to or engaged in said conspiracy or combination, whether principals or accessories, shall be deemed guilty of a felony, and upon conviction thereof shall be liable to a penalty of not exceeding $10,000 or to imprisonment not exceeding ten years, or both, at the discretion of the court."

Cong. Globe, 42d Cong., 1st Sess., 366.[21]

Many representatives, however, doubted the constitutionality of a provision which elevated state misdemeanors such as assault and battery to the level of federal felonies. *See, e.g.*, Cong. Globe, 42d Cong., 1st Sess., 455 (Representative Cox: "The fourteenth amendment does not in a single particular enlarge the jurisdiction of the United States over crimes in the States").

Many others were concerned that the Act would make every state crime a federal offense. *See, e.g.*, Cong. Globe, 42d Cong., 1st Sess., 382-383.

As a result a substitute amendment was adopted which provided, in part, as follows:

> SEC. 2. That if two or more persons within any State or Territory of the United States shall conspire . . .
>
> * * *

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[21] Other sections of the 1871 Act empowered the President to call out the militia or land and naval forces of the United States and to suspend the writ of *habeas corpus* when the conspirators in a state became so powerful that they could obstruct or hinder the execution of the laws. These provisions are typical of the type of legislation which the Reconstruction Congress enacted to attempt to correct the social disorder in the South.

> together for the purpose either directly or indirectly of depriving any person or any class of persons of the equal protection of the laws, or of equal privileges or immunities under the laws, or for the purpose of preventing or hindering the constituted authorities of any State from giving or securing to all persons within each State the equal protection of the law, or to injure any person in his person or his property for lawfully enforcing the right of any person or class of persons to the equal protection of the laws, each and every person so offending shall be deemed guilty of a high crime, and, upon conviction thereof in any district or circuit court of the United States, or district or supreme court of any Territory of the United States having jurisdiction of similar offenses, shall be punished by a fine not less than $500 nor more than $5,000, or by imprisonment, with or without hard labor, as the court may determine, for a period of not less than six months nor more than six years, as the court may determine, or by both such fine and imprisonment as the court shall determine; and if any one or more persons engaged in such conspiracy, such as is defined in the preceding section, shall do or cause to be done any act in furtherance of the object of such conspiracy, whereby any person shall be injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the person so injured or deprived of such rights and privileges may have and maintain an action for the recovery of damages occasioned by such injury or deprivation of rights and privileges against any one or more of the persons engaged in such conspiracy.

Cong. Globe, 42d Cong., 1st Sess., 477.[22]

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[22] The criminal portion of this section was later codified as R. S. § 5519, which was declared unconstitutional, as will be discussed *infra*, in *United States v. Harris*, 106 U.S. 629 (1883), and was later repealed. The civil remedy was codified as R.S. 1980 which later became 42 U.S.C. § 1985.

The specification of crimes was therefore deleted and a civil remedy added by the substitute amendment. Deletion of the list of state laws from the substitute amendment reveals that the amendment's scope was more narrow than that of the original bill.

This legislative history also makes clear that the purpose of the statute was to provide a federal forum for the vindication of violations of the fundamental rights of citizens, those rights which had so recently been extended to blacks by the thirteenth, fourteenth, and fifteenth amendments. *District of Columbia v. Carter*, 409 U.S. 418 (1973).[23]

Consistent with this legislative history, Mr. Justice Burton, speaking on behalf of the dissenters in *Collins v. Hardyman*, 341 U.S. 651 (1951), recognized:

> Congress certainly has the power to create a federal cause of action in favor of persons injured by private individuals through the abridgment of federally created constitutional rights. It seems to me that Congress has done just this in R. S. § 1980(3) [now 42 U.S.C. 1985(3)].

341 U.S. at 664, as quoted with approval in *Griffin v. Breckenridge*, 403 U.S. 88, 95 (1971).[24]

In *Griffin*, the Court described this element of the cause of action under Section 1985(3) as the assertion that the plaintiff was "deprived of having and exercising any right or privilege of a citizen of the United States." 408 U.S. at 103.

In discussing the parameters of 18 U.S.C. § 241, Section 1985(3)'s closest criminal analogue, Justice Fortas declared:

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[23] It is, therefore, unsurprising that the Enforcement Act of 1871 was entitled "An Act To Enforce The Provisions Of The Fourteenth Amendment To The Constitution Of The United States, And For Other Purposes." 17 Stat. 13.

[24] In *Collins* the right to petition the federal government was in issue.

> In this context, it is hardly conceivable that Congress extended § 241 to apply only to a narrow and relatively unimportant category of rights. We cannot doubt that the purpose and effect of § 241 was to reach assaults upon rights under the entire Constitution, including the Thirteenth, Fourteenth, and Fifteenth Amendments, and not merely under part of it.

United States v. Price, 383 U.S. 787, 805 (1966).

Unfortunately, many courts have interpreted the phrase "under the laws" much more broadly and literally than the *Price* Court. The Court of Appeals for the Fifth Circuit, for example, has developed an "independent illegality" theory. *McLellan v. Mississippi Power & Light Co.*, 545 F.2d 919 (5th Cir. 1977) (*en banc*). Under this theory a cause of action under Section 1985(3) requires a violation of a right secured by *any* federal or state statute.[25]

Application of the independent illegality theory, however, leads to extremely anomalous results, as demonstrated by *Britt v. Suckle*, 453 F. Supp. 987 (E.D.Tex. 1978), where the court, applying the *McLellan* standards under Section 1985(3), found federal jurisdiction under Section 1985(2) for an alleged violation of rights conferred by the Texas Workmen's Compensation Act. Under this theory, therefore, the federal courts can and will be overburdened with actions which should be asserted only in state court.[26]

Furthermore, the independent illegality theory removes protection from those rights which need it the most. As Judge

[25] In *McLellan* the plaintiff asserted a violation of his rights under the Bankruptcy Act. The court dismissed the suit, however, because the plaintiff had no demonstrable rights under that Act.

[26] Under 18 U.S.C. § 241, this Court has already determined that no rights conferred by state law fall within the scope of the "under the laws" provision in that statute. *United States v. Waddell*, 112 U.S. 76 (1884).

Godbold noted in his dissent from the *McLellan* majority decision:

> I would have thought that the strongest, not the weakest, case for application of § 1985(3) is presented when no other law protects the exercise of an important right.

545 F.2d at 938. *See also* Note, *Private Conspiracies to Violate Civil Rights*, 90 Harv. L. Rev. 1721 (1977).

The independent illegality approach is, therefore, an unsound method for determining the rights enforceable under Section 1985(3).

In the decision below, the Court of Appeals for the Third Circuit took another approach. The Court declared that:

> Whatever else 'equal privileges and immunities' or 'equal protection' may mean in the context here, we conclude that a deprivation of equal privileges and immunities under § 1985(3) includes the deprivation of a right secured by a federal statute guaranteeing equal employment opportunity [Pet. App. A at 28a].

The interpretation of the Third Circuit therefore would allow rights conferred explicitly by other federal statutes to be asserted under Section 1985(3). That court, however, completely ignored the crucial question of whether the federal statute granting the right provides for federal jurisdiction in its own terms.

In *Hodgin v. Jefferson*, 447 F.Supp. 804 (D. Md. 1978), for example, the court applied an interpretation of Section 1985(3) similar to the one espoused by the Third Circuit and held that an alleged violation of rights created by the Federal Equal Pay Act, 29 U.S.C. § 206d (1976), supports a cause of action under Section 1985(3).

The *Hodgin* court ignored the fact that Congress created jurisdiction in the federal courts to remedy violations of the Equal Pay Act under 29 U.S.C. § 216. Moreover, federal jurisdiction over a suit by an individual employee is *conditional* on the following:

> The right provided by this subsection to bring an action by or on behalf of any employee, and the right of any employee to become a party plaintiff to any such action, shall terminate upon the filing of a complaint by the Secretary of Labor in an action under Section 217. . . .

In light of the decision below, however, an employee could bring suit under Section 1985(3) to vindicate rights under the Equal Pay Act, and this action would not be blocked by the proviso in Section 216. Under these circumstances, the intent of Congress in enacting Section 216 would clearly be contravened.[27] *See also Murphy v. Operating Engineers, Local 18,* .... F.Supp. ...., 99 LRRM 2074, (N.D. Ohio 1978) (violation of rights under Labor-Management Reporting and Disclosure Act enforceable under Section 1985(3)).

The legislative history of Section 1985(3) indicates that the statute was intended to provide a federal forum for the vindication of rights which otherwise had to be protected by the ineffective state courts in the Reconstruction South. If a federal statute provides its own jurisdictional basis for enforcing the right granted by that statute, Section 1985(3) is not needed and should not be applied to create duplicate, and sometimes conflicting, jurisdiction.

[27] It should also be noted that under the Third Circuit's interpretation a corporate employer almost necessarily "conspires" to set wage policies and practices. In addition, a violation of the Equal Pay Act requires sex-based discrimination. Every violation of the Equal Pay Act, therefore, *automatically* becomes a violation of Section 1985(3).

Following this reasoning, the Court of Appeals for the Second Circuit held that an alleged violation of rights granted under the Labor-Management Relations Act, 29 U.S.C. § 158 (1976), cannot establish a cause of action under 18 U.S.C. § 241:

> Courts, in a variety of ways, have emphasized that enforcement of rights under the Labor Act is entrusted exclusively to the Labor Board as an expert administrative agency, whose orders are reviewed by the courts.

United States v. DeLaurentis, 491 F.2d 208, 213 (2d Cir. 1974). The administrative process therefore cannot be circumvented by asserting federal jurisdiction under 18 U.S.C. § 241. *See also Ferdnance v. Automobile Trans. Inc.,* .... F.Supp. ...., 97 LRRM 2473 (E.D. Mich. 1978) (violation of rights under National Labor Relations Act will not support cause of action under Section 1985(3)).

Similarly, in *Platt v. Burroughs Corp.,* 424 F. Supp. 1329 (E.D.Pa. 1976), the court refused to allow an alleged violation of the Age Discrimination in Employment Act to establish a cause of action under Section 1985(3) because Congress intended the procedures of that Act to be the "exclusive judicial remedy for age discrimination." *Id.* at 1340.[28]

The rights assertible under Section 1985(3), therefore, cannot include rights conferred by federal statutes which provide for their own jurisdictional basis. A decision to the contrary destroys the careful administrative framework which Congress created in statutes like the Equal Pay Act and the Age Discrimination in Employment Act and creates a general

[28] *Cf. United States v. Johnson,* 390 U.S. 563 (1968), where the Court held that the black plaintiffs could proceed against the defendants under 18 U.S.C. § 241 only because no relief was available to plaintiffs under the exclusive remedy provisions of Title II of the Civil Rights Act of 1964, 42 U.S.C. § 2000b (1976).

federal tort law. Section 1985(3), therefore, applies only to fundamental constitutional rights for which there would otherwise be no federal jurisdictional base.

B. The Administrative/Judicial Framework Established By Congress Under Title VII Is The Exclusive Remedy For Violations Of Rights Conferred By Title VII.

The potentially disastrous effects of the decision below are crystallized in the Third Circuit's decision to allow the right to be free from sex discrimination in private employment granted by Title VII to be enforced under Section 1985(3).

The cornerstone of the Title VII enforcement scheme is conciliation of charges *before* the involvement of a federal court is necessitated. In *Alexander v. Gardner-Denver Co.*, 415 U.S. 36 (1974), Mr. Justice Powell, speaking for a unanimous court, noted:

> Congress enacted Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.*, to assure equality of employment opportunities by eliminating those practices and devices that discriminate on the basis of race, color, religion, sex, or national origin. *McDonnell Douglas Corp v. Green*, 411 U.S. 792, 800 (1973); *Griggs v. Duke Power Co.*, 401 U.S. 424, 429-430 (1971). *Cooperation and voluntary compliance were selected as the preferred means for achieving this goal.* To this end, Congress created the Equal Employment Opportunity Commission and established a procedure whereby existing state and local equal employment opportunity agencies, as well as the Commission, *would have an opportunity to settle disputes through conference, conciliation, and persuasion before the aggrieved party was permitted to file a lawsuit.*

Id. at 44 (emphasis added).

To achieve this goal of conciliation without litigation, Congress established a specific administrative framework

which must be exhausted before an aggrieved party could file a suit in federal court. A charge must be filed with the Equal Employment Opportunity Commission (or a state or local fair employment practice agency). The charge must be investigated, and the Commission must attempt to resolve the dispute through conciliation. Only when conciliation fails may a suit be filed by the Commission or the charging party. *Occidental Life Insurance Co. v. EEOC*, 432 U.S. 355, 359-360 (1977).

Based on these considerations the Court of Appeals for the Fourth Circuit held that the procedures under Title VII are "the exclusive mechanism for effectuating rights created by the statute." *Doski v. M. Goldseker Co.*, 539 F.2d 1326, 1334 (4th Cir. 1976). Since the plaintiff's right to be free from sex discrimination in private employment stemmed solely from Title VII, therefore, a violation of this right could not be asserted under Section 1985(3).

The Fourth Circuit correctly recognized that enforcement of Title VII rights under Section 1985(3) would destroy the careful enforcement mechanism created by Congress under Title VII. These fears are not based on mere supposition because enforcing a Title VII right under Section 1985(3) is much more attractive to a plaintiff. Under 1985(3), a plaintiff can avoid administrative compliance and obtain a longer statute of limitations, [29] the right to a jury trial,[30] no limitation on back pay,[31] and punitive damages.[32]

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[29] The Third Circuit has recently held that the statute of limitations for alleged violations of the Civil Rights Act of 1866 and 1870 occurring in the Commonwealth of Pennsylvania is six years. *Davis v. United States Steel Supply*, 581 F.2d 335 (3d Cir. 1978). This limitation period should be compared to the much shorter period (180 days, or 300 days in a deferral state) established by Congress for the filing of a charge with the Equal Employment Opportunity Commission to enforce Title VII rights. 42 U.S.C. § 2000e-5(c). This Court has recently emphasized the importance of such a timely filing with the Commission. *Evans v. United Air Lines, Inc.*, 431 U.S. 553 (1977).

(Footnotes continued on following page)

Thus, the effect of allowing Title VII rights to be enforced under Section 1985(3) would be a needless flood of federal court employment discrimination cases which could have been resolved through the administrative and conciliatory processes of Title VII as Congress intended.

Despite these considerations, the Third Circuit held that Title VII rights can be enforced under Section 1985(3) because the "language seems to protect *all* such privileges and immunities" (Pet. App. A at 38a). The Third Circuit totally ignored the consequences flowing from the assertion of Title VII rights under Section 1985(3).

Instead, the Third Circuit focused on generalities of conflicts between federal statutes and declared that "implied repeals" only occur if the statutes are unreconciliable (Pet. App. A at 38a). The Third Circuit further observed that this Court has held that the enactment of Title VII did not preempt the assertion of other pre-existing rights. *Johnson v. Railway Express Agency*, 421 U.S. 454 (1975). Both of these arguments, however, overlook the rationale of the *Doski* opinion.

First, there has been no suggestion that Title VII impliedly repealed Section 1985(3). As discussed in the previous sec-

(Footnotes continued from preceding page)

[30] *See e.g., Cameron v. Brock*, 473 F.2d 608 (6th Cir. 1973); *Don v. Okmulgee Memorial Hospital*, 443 F.2d 234 (10th Cir. 1971). There is no right to a jury trial under Title VII. *Johnson v. Georgia Highway Express*, 417 F.2d 1122 (5th Cir. 1969); *Slack v. Havens*, 522 F.2d 1091 (9th Cir. 1975).

[31] Title VII contains a two-year statutory limitation on back pay. 42 U.S.C. § 2000e-5(g).

[32] Unlike Section 1985(3), punitive damages are not available under Title VII. *Compare Murphy v. Local Union No. 18*, ... F.Supp. ....., 99 LRRM 2074 (N.D. Ohio 1978) (Punitive damages awarded under Section 1985(3)) *with Richerson v. Jones*, 551 F.2d 918 (3d Cir. 1977) (punitive damages may not be awarded in Title VII suit).

tion, Section 1985(3) is necessary to provide federal jurisdiction to remedy violations of the fundamental rights of national citizenship.

Second, the *Doski* decision did not foreclose the plaintiff from asserting pre-existing rights. Unlike Section 1981, Section 1985(3) is a *remedial* statute.[33] It must look elsewhere to find a source for the right to be protected (Pet. App. A at 29a). Before passage of Title VII, there was no right to be free from sex discrimination in private employment. When Congress did create such a right it chose a careful administrative/judicial framework in which that right must be remedied. The *Doski* decision, therefore, did not deprive a plaintiff of a pre-existing right.[34]

The sole question here is whether a right created by Title VII and Title VII alone can be remedied under another statute. In *Brown v. General Services Administration*, 425 U.S. 820 (1976), this Court determined that Section 717 of Title VII provides the exclusive remedy for claims of discrimination in federal employment. The reasoning behind this conclusion was as follows:

(1) A review of the prior case law indicated that there was no effective pre-existing remedy for employment discrimination suffered by federal employees;

[33] *Cf. United States v. Guest*, 383 U.S. 745, 754-55 (1966) (18 U.S.C. § 241 "does not purport to give substantive, as opposed to remedial, implementation to any rights . . .").

[34] 42 U.S.C. § 1981, on the other hand, granted persons the same rights to make and enforce contracts, to sue, be parties, and give evidence as enjoyed by white citizens. Unlike Section 1985(3), therefore, Section 1981 created substantive rights which pre-dated Title VII. *Johnson v. Railway Express Agency, supra*, therefore, is not applicable here. *See also Runyon v. McCrary*, 427 U.S. 160 (1976); *Sullivan v. Little Hunting Park, Inc.*, 396 U.S. 229 (1970) (substantive rights conferred by Section 1982 not preempted by passage of Civil Rights Act of 1964).

(2) Congress intended to create such a right and remedy with the enactment of Section 717; and

(3) The Congressional intent was "to create an exclusive, preemptive administrative and judicial scheme for the redress of federal employment discrimination." *Id.* at 829.

As held by the *Brown* Court:

> The balance, completeness, and structural integrity of § 717 are inconsistent with the petitioner's contention that the judicial remedy afforded by § 717(c) was designed merely to supplement other putative judicial relief. His view fails, in our estimation, to accord due weight to the fact that unlike these other supposed remedies, § 717 does not contemplate merely judicial relief. Rather, it provides for a careful blend of administrative and judicial enforcement powers. Under the petitioner's theory, by perverse operation of a type of Gresham's law, § 717, with its rigorous administrative exhaustion requirements and time limitations, would be driven out of currency were immediate access to the courts under other, less demanding statutes permissible. The crucial administrative role that each agency together with the Civil Service Commission was given by Congress in the eradication of employment discrimination would be eliminated "by the simple expedient of putting a different label on [the] pleadings." *Preiser v. Rodriguez*, 411 U.S. 475, 489-490 (1973). It would require the suspension of disbelief to ascribe to Congress the design to allow its careful and thorough remedial scheme to be circumvented by artful pleading.

Id. at 832-833.[35]

[35] This analysis was recently echoed in *International Brotherhood of Teamsters v. Daniel*, ... U.S. ...., 47 U.S.L.W. 4135, 4139 (January 16, 1979):

> The existence of this comprehensive legislation governing the use and terms of employee pension plans severely undercuts all arguments for extending the Securities Acts to noncontributory, compulsory pen-

(Footnote continued on following page)

Every one of the considerations which mandated the Court's decision in *Brown* applies with equal force to this case:

(1) There was no right or remedy for female employees who suffered discrimination in private employment;

(2) Congress intended to create such a right and remedy by enacting Title VII; and

(3) The Congressional intent was to create an exclusive, preemptive administrative and judicial scheme of enforcement.

Novotny is arguing here, just like the Petitioner in *Brown*, that "artful pleading" under Section 1985(3) can circumvent the careful "exhaustion requirements and time limitations" of Title VII.

There is thus no support or reason for the Third Circuit's determination that Title VII rights can be enforced under Section 1985(3).[36] The broad interpretation of "equal

(Footnote continued from preceding page)

> sion plans. Congress believed that it was filling a regulatory void when it enacted ERISA, a belief which the SEC actively encouraged. Not only is the extension of the Securities Acts by the court below unsupported by the language and history of those Acts, but in light of ERISA it serves no general purpose. See *Califano v. Sanders*, 430 U.S. 99, 104-107 (1977). *Cf. Boys Markets, Inc. v. Retail Clerks Union*, 398 U.S. 235, 250 (1970). Whatever benefits employees might derive from the effect of the Securities Acts are now provided in more definite form through ERISA.

[36] The Third Circuit characterized the decision in *Marlowe v. Fischer Body*, 489 F.2d 1057 (6th Cir. 1973), as being apposite to the *Doski* decision. In *Marlowe*, however, the plaintiff never alleged a cause of action under Section 1985(3). While remanding the case, the Sixth Circuit noted that an amended complaint might allege such a cause of action. Since the plaintiff was alleging *racial* discrimination, there were a number of constitutional provisions on which he could rely. There is no discussion in the *Marlowe* opinion, however, regarding the conflict between Title VII and Section 1985(3) and no holding that Title VII rights are enforceable under Section 1985(3).

privileges and immunities under the laws" espoused by the Third Circuit wreaks havoc with numerous jurisdictional provisions carefully thought out and enacted by Congress. The decision of the Third Circuit therefore must be reversed.

III. There Is No Congressional Source Of Power To Reach The Conspiracy Alleged In The Complaint Under Section 1985(3).

In *Griffin*, this Court held that a "source of congressional power to reach the private conspiracy alleged by the complaint" must be identified in each case. 403 U.S. at 104.

In the Third Circuit's opinion, the private conspiracy alleged by the instant Complaint was designed to deprive the Association's female employees of equal employment opportunities.

The Third Circuit identified the source of the class right as Title VII, more particularly 42 U.S.C § 2000e-2(a). The appellate court then determined that Title VII was properly enacted pursuant to the commerce clause of the United States Constitution, and "[t]he same authority which warrants the provision of such rights in the first place equally empowers Congress to provide sanctions against conspiracies to interfere with the equal enjoyment of rights under Title VII" (Pet. App. A at 47a).

It does not automatically follow that the commerce clause provides a constitutional source of power for enactment of 1985(3), however, merely because it provides a source for Title VII. To the contrary the commerce clause was never intended to be a source of power under Section 1985(3) and cannot reasonably be interpreted to extend to the private conspiracy alleged in the instant Complaint.

Although one historically permissible form of federal commerce regulation has been the imposition of "protective conditions" on the privilege of engaging in an activity that affects commerce, [37] this Court has consistently required:

1) that the activity sought to be regulated have a substantial impact on interstate commerce;[38] and

2) evidence that Congress intended to protect interstate commerce through the imposition of such protective conditions.[39]

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[37] *See, e.g., Hoke v. United States*, 227 U.S. 308 (1913) (upholding a ban on the interstate transportation of women for immoral purposes); *Hipolite Egg Co. v. United States*, 220 U.S. 45 (1911) (upholding a ban on interstate transportation of impure food); *Champion v. Ames*, 188 U.S. 321 (1903) (the so-called "Lottery Case" where this Court upheld the constitutionality of legislation banning the interstate transportation of lottery tickets).

[38] In *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 255 (1964), Justice Clark stated:

> In short, the determinative test of the exercise of power by the Congress under the Commerce Clause is simply whether the activity sought to be regulated is 'commerce which concerns more states than one' and has a real and substantial relation to the national interest.

See, also, United States v. Darby, 312 U.S. 100 (1941); *NLRB v. Fainblatt*, 306 U.S. 601 (1939); *Wickard v. Filburn*, 317 U.S. 111 (1942); *United States v. Sullivan*, 332 U.S. 689 (1948); *McDermott v. Wisconsin*, 228 U.S. 115 (1913); *Schecter Poultry Corp. v. United States*, 295 U.S. 495 (1935).

[39] Professor Laurence Tribe has noted in his treatise *American Constitutional Law* (1978) at p. 243:

> The Supreme Court pays particularly close heed to statutory language and legislative history in judging the reach of laws enacted under the commerce clause. A law will not be held to affect all the activities Congress in theory can control unless statutory language or legislative history constitutes a *clear statement* that Congress intended to exercise its commerce power in full.
>
> Professor Tribe cites a portion of a law review article written by Professor Begen which states:
>
> > . . . where the relationship of the law to interstate commerce is not readily apparent, the Court should require Congress to relate the law to its impact on interstate transactions. This could assist in focusing Congressional concern on the proper issues."

Begen, *The Hunting of the Shark: An Inquiry Into the Limits of Congressional Power Under the Commerce Clause*, 8 Wake Forest L. Rev. 187, 198 (1972).

Inquiry into Section 1985(3) reveals satisfaction of neither requirement.

The framers of § 1985(3) did not incorporate parameters into the statute which could establish whether a given activity regulated had a substantial impact on interstate commerce; nor does the statute's legislative history reveal that Congress intended or needed to protect interstate commerce through it.

In contrast the source of congressional power *expressly* relied on in enacting the Civil Rights Act of 1964 is the commerce clause. Although Title VII's constitutionality has never been challenged in this Court, its sister statute, Title II, was challenged.[40] In those cases this Court examined at length whether the activities which the comprehensive framework of Title II sought to regulate had a substantial impact on interstate commerce. In finding Title II constitutional, this Court found that racial discrimination in housing had a sufficient impact on commerce to justify the statute's partial reliance on the commerce clause as its source of congressional power.

In deciding the constitutionality of Title II, this Court noted that the framers of Title II had carefully incorporated into that statute's framework elements of proof that the regulated activity must "affect commerce." Section 201(b) of Title II, for instance, lists four classes of business establishments. Each "serves the public" and "is a place of public accommodation" within the meaning of Section 201(a), but "only if its operations affect commerce, or if discrimination or segregation by it is supported by state action." Title VII contains similar elements of proof. A condition precedent for a cause of action under Title VII is that the employer against whom the suit is brought must employ more than 25 employees and must engage in activity in interstate commerce.

[40] *Heart of Atlanta Motel, supra; Katzenbach v. McClung*, 379 U.S. 294 (1964); *Daniel v. Paul*, 395 U.S. 298 (1969).

The framers of § 1985(3) never contemplated that § 1985(3) might provide for a private cause of action to vindicate rights against discrimination in employment. Rather, as discussed *supra* at 29, the intent underlying § 1985(3) was to provide a federal forum for the vindication of violations of the fundamental rights of citizens, those rights so recently extended to blacks by the thirteenth, fourteenth and fifteenth amendments. Section 1985(3)'s framework thus should not be interpreted to incorporate elements of proof that activities to which its remedy extends must in any way "affect commerce."

As this Court noted in *Heart of Atlanta Motel, supra* at 257, "overwhelming evidence of the disruptive effect that racial discrimination had on commercial intercourse" justified Congress' legislation against moral wrongs in Title II. Absent proof of such effect, however, Congress could not legislate against these moral wrongs.

Such proof is absent in the legislative history and the framework of § 1985(3). Application of 1985(3) to a private conspiracy to deny women their rights under Title VII pursuant to the commerce clause is therefore unjustifiable.

Since Title VII and its constitutional source of power, the commerce clause, cannot be used to reach the private conspiracy alleged here, another source of power for the class right must be identified. Novotny has previously suggested two such sources, the thirteenth and fourteenth amendments.

A. The Thirteenth Amendment Does Not Provide A Source Of Power To Remedy Discrimination On The Basis Of Sex.

The thirteenth amendment prohibits slavery and involuntary servitude within the United States. The amendment has a *substantive* nature in that it is a self-executing abolition and prohibition of the condition of slavery. Pursuant to Section 2 of the amendment, however, Congress may pass

remedial legislation to "abolish all badges and incidents of slavery in the United States." *Civil Rights Cases*, 109 U.S. 3, 20 (1883); *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 439 (1968).

In *Jones, supra*, the Court conducted an extensive analysis of the scope of the thirteenth amendment and noted that:

> The Thirteenth Amendment authorizes Congress not only to outlaw all forms of slavery and involuntary servitude but also to eradicate the last vestiges and incidents of a society half slave and half free, by securing to all citizens, of every race and color, "the same right to make and enforce contracts, to sue, be parties, give evidence, and to inherit, purchase, lease, sell and convey property, as is enjoyed by white citizens." 109 U.S., at 22.

392 U.S. at 441 n. 78.

Although the thirteenth amendment, by its own terms, prohibits the imposition of the condition of slavery on any person, the grant of power to Congress to pass legislation pursuant to the amendment was limited to the eradication of the badges of slavery as practiced at that time, *i.e.*, slavery on the basis of race and color. As a result, the thirteenth amendment, as interpreted in *Jones*, only authorizes remedial legislation which prohibits discrimination on the basis of race or color. See Note, *The "New" Thirteenth Amendment: A Preliminary Analysis*, 82 Harv. L. Rev. 1294, 1315 (1969).

Consequently, this Court has consistently held that civil rights statutes which look to the thirteenth amendment as their source of congressional power are limited to discrimination on the basis of race or color. *E.g., Runyon v. McCrary*, 427 U.S. 160 (1976) (42 U.S.C. § 1981 limited to racial discrimination); *Jones, supra* at 413 ("the statute in this case [42 U.S.C. § 1981] deals only with racial discrimination

and does not address itself to discrimination on grounds of religion or national origin".[41]

Cases limiting the scope of the remedial legislation passed pursuant to the thirteenth amendment are totally consistent with judicial decisions which have described the limits of the amendment itself. In *United States v. Cruikshank*, 25 F. Cas. 707 (C.C.La. 1874), *aff'd*, 92 U.S. 542 (1876), Mr. Justice Bradley, sitting on the circuit, dismissed an indictment under Section 6 of the 1870 Act (which closely parallels the language of Section 1985(3)) for failure to allege that racial prejudice was the sole motivation for the conspiracy. It was only such private action that Congress could prohibit under the thirteenth amendment.

Similarly, in *United States v. Harris*, 106 U.S. 629 (1883), the Court declared the criminal counterpart to Section 1985(3), R.S. § 5519, unconstitutional because it potentially applied to conspiracies by whites against whites as well as blacks. *Accord, Le Grand v. United States*, 12 F. 577 (C.C.E.D. Tex. 1882). *Cf. United States v. Reese*, 92 U.S. 214 (1876) (Section 3 and 4 of the 1870 Act, passed pursuant to the fifteenth amend-

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[41] The Third Circuit's opinion suggests that sex discrimination should be cognizable under Section 1985(3) because it is cognizable under Section 1983. Section 1983, however, does not look to the thirteenth amendment as its source of congressional power. The source of Section 1983, as indicated by its "under color of state law" language is the fourteenth amendment. *Monroe v. Pape*, 365 U.S. 167 (1961). As this Court warned in the *Civil Rights Cases*, 109 U.S. at 23:

> We must not forget that the province and scope of the 13th and 14th Amendments are different . . . The Amendments are different, and the powers of Congress under them are different. What Congress has power to do under one, it may not have power to do under the other.

ment, are unconstitutional because they are not limited to racial discrimination).[42]

Thus, when the source of constitutional power invoked under Section 1985(3) is the thirteenth amendment, the analysis can be quite simplified. In *Dombrowski, supra,* 459 F.2d at 195, Judge (now Mr. Justice) Stevens noted that the plaintiff was white and there could be no allegation of racial motivation behind the refusal of the alleged conspiracy to rent office space to him. The thirteenth amendment, therefore, could not provide a basis of constitutional power to provide a remedy for the acts of the private conspiracy, and the Section 1985(3) cause of action was dismissed.

Similarly, in this case the class allegedly subject to invidious discrimination is not a "racial" group. Nor is it a group "chafing under the hands of involuntary servitude."[43]

All of this precedent has consistently interpreted the purpose of the thirteenth amendment to be the abolition of the pervasive effects of centuries of slavery on the basis of race.

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[42] In *Griffin*, it was noted that the *Harris* Court followed a rule of severability that required invalidation of a statute if any part of it was unconstitutionally overboard, unless its different parts could be read as wholly independent provisions. 403 U.S. at 88. The *Griffin* Court also suggests that the only redeeming factor for the constitutionality of Section 1985(3) is the fact that this severability rule is no longer followed. *Id.* ("[W]e need not find the language of § 1985(3) now before us constitutional in all its possible applications"). It is significant, however, that the *Griffin* Court anticipated the possibility that Section 1985(3) can be unconstitutionally applied. One such application would be the Third Circuit's extension of the statute to sex discrimination in private employment.

[43] The fact that you do not like every aspect of employment where you work does not mean that you are a slave. If you have the freedom to quit, you are not subject to involuntary servitude. *United States v. Shackney*, 333 F.2d 475 (2d Cir. 1964); *Flood v. Kuhn*, 316 F. Supp. 271 (S.D.N.Y. 1970), *aff'd*, 407 U.S. 258 (1972). There is no condition of slavery or involuntary servitude even allegedly present in this case.

Despite the "poetic license" taken in the plurality opinion in *Frontiero v. Richardson*, 411 U.S. 677 (1973), at the time the thirteenth amendment was passed, women as a class were not the subjects of institutionalized slavery as contemplated by Congress. Obviously, then, the congressional power to adopt remedial legislation pursuant to the amendment was never intended as a remedy for sex discrimination.

In *Jones, supra,* 392 U.S. at 440, the Court carefully noted the statement of Senator Trumbull, the Chairman of the Judiciary Committee:

> I have no doubt that under this provision . . . we may destroy all these discriminations in civil rights against the black man; and if we cannot, our constitutional amendment amounts to nothing. *It was for that purpose that the second clause of that amendment was adopted.* . . .

Cong. Globe, 39th Cong., 1st Sess. 322 (emphasis added).

Women were simply not intended to be the beneficiaries of remedial legislation under the thirteenth amendment, and there is no judicial support or reason for the proposition that sex discrimination in private employment is cognizable under Section 1985(3) due to congressional power under the thirteenth amendment.[44] Sex discrimination, therefore, is not a cognizable class under Section 1985(3) to the extent the statute looks to the thirteenth amendment as a constitutional source of power.

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[44] The fact that 42 U.S.C. § 1981 has been interpreted to make all facets of racial discrimination actionable, *McDonald v. Santa Fe Trail Transportation Co.*, 427 U.S. 273 (1976), does not lend any support to the proposition that such remedial statutes, and the thirteenth amendment in general, prohibit sex discrimination in private employment. That proposition has been uniformly rejected. *See, e.g., League of Academic Women v. Regents of University of California*, 343 F. Supp. 636 (N.D. Cal. 1972).

B. The Fourteenth Amendment Does Not Provide A Source Of Power To Remedy Discrimination By A Private Employer.

In *Griffin*, the Court declined to define the scope of Section 1985(3) if the source of congressional power under consideration was the fourteenth amendment. 403 U.S. at 107. Prior decisions, however, have clearly limited that amendment to circumstances involving some form of state action.

Soon after passage of the fourteenth amendment, the Court addressed its scope in the *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36 (1873). A majority of the Court held that the purpose of the amendment was to protect the privileges and immunities of citizens of the United States from hostile legislation by the states:

> If the States do not conform their laws to its requirements, then, by the 5th section of the article of Amendment, Congress was authorized to enforce it by suitable legislation.

83 U.S. at 81.

Similarly, in *United States v. Cruikshank, supra,* Chief Justice Waite held that:

> The 14th Amendment prohibits a State from depriving any person of life, liberty or property without due process of law, but this adds nothing to the rights of one citizen as against another. It simply furnishes an additional guaranty against any encroachment by the States upon the fundamental rights which belong to every citizen as a member of society.

92 U.S. at 554. *See also United States v. Harris, supra.*

In the *Civil Rights Cases, supra,* the Court declared the Civil Rights Act of 1875 unconstitutional because it prohibited discrimination on the basis of color by owners of private inns and theatres. In considering whether the legislation could be

sustained under the fourteenth amendment, Mr. Justice Bradley held as follows:

> It is state action of a particular character that is prohibited. *Individual invasion of individual rights is not the subject matter of the Amendment.* It has a deeper and broader scope. It nullifies and makes void all state legislation, and state action of every kind, which impairs the privileges and immunities of citizens of the United States, or which injures them in life, liberty or property without due process of law, or which denies to any of them the equal protection of the laws. It not only does this, but, in order that the national will, thus declared, may not be a mere *brutum fulmen*, the last section of the Amendment invests Congress with power to enforce it by appropriate legislation. To enforce what? To enforce the prohibition. To adopt appropriate legislation for correcting the effects of such prohibited state laws and state Acts, and thus to render them effectually null, void and innocuous. This is the legislative power conferred upon Congress, and this is the whole of it. It does not invest Congress with power to legislate upon subjects which are within the domain of state legislation; but to provide modes of relief against state legislation or state action, of the kind referred to. It does not authorize Congress to create a code of municipal law for the regulation of private rights; but to provide modes of redress against the operation of state laws, and the action of state officers executive or judicial, when these are subversive of the fundamental rights specified in the Amendment. Positive rights and privileges are undoubtedly secured by the 14th Amendment; but they are secured by way of prohibition against state laws and state proceedings affecting those rights and privileges, and by power given to Congress to legislate for the purpose of carrying such prohibition into effect; and such legislation must, necessarily, be predicated upon such supposed state laws or state proceedings, and be directed to the correction of their operation and effect.

109 U.S. at 11-12 (emphasis added).

In *Shelley v. Kraemer*, 334 U.S. 1 (1948), the Court again emphasized:

> Since the decision of this Court in the Civil Rights Cases, 1883, 109 U.S. 3 [3 S.Ct. 18, 27 L.Ed. 835], the principle has become firmly embedded in our constitutional law that the action inhibited by the first section of the Fourteenth Amendment is only such action as may fairly be said to be that of the States. That Amendment erects no shield against merely private conduct, however discriminatory or wrongful.

334 U.S. at 13 (footnote omitted).

This clear precedent led both the Courts of Appeals for the Seventh and Fourth Circuits to expressly hold that state action must be present if the individual or class right violated relies on the fourteenth amendment as a source of congressional power under Section 1985(3). *Dombrowski v. Dowling*, 459 F.2d 190 (7th Cir. 1972); *Cohen v. Illinois Institute of Technology*, 524 F.2d 818 (7th Cir. 1975), *cert. denied*, 425 U.S. 943 (1976); *Murphy v. Mt. Carmel High School*, 543 F.2d 1189 (7th Cir. 1976); *Bellamy v. Mason's Stores*, 508 F.2d 504 (4th Cir. 1974). *See also Lopez v. Arrowhead Ranches*, 523 F.2d 924, 927 n. 3 (9th Cir. 1975).

In *Dombrowski, supra*, Judge (now Mr. Justice) Stevens noted:

> The breadth of the statute's coverage is yet to be determined, but three categories of protected rights have been plainly identified. *Griffin* gives express recognition to a black citizen's Thirteenth Amendment rights and to his federal right to travel interstate; the title of the statute expressly identifies the third category, namely, rights protected by the Fourteenth Amendment. We think the § 1983 cases make it clear that in this third category a 'state involvement' requirement must survive *Griffin*.
>
> * * *

> Since the Fourteenth Amendment, unlike the Thirteenth, affords the plaintiff no protection against discrimination in which there is no state involvement of any kind, a private conspiracy which arbitrarily denies him access to private property does not abridge his Fourteenth Amendment rights.

459 F.2d at 195-96 (footnote omitted).

The only court of appeals to hold that the fourteenth amendment will support a cause of action against a private conspiracy under Section 1985(3) was the Eighth Circuit in *Action v. Gannon*, 450 F.2d 1227 (8th Cir. 1971).[45] In *Action* the court determined that Congress was given the power in Section 5 of the fourteenth amendment to enforce rights guaranteed by the amendment against private conspiracies. The court reached this conclusion, despite the more than fifty years of Supreme Court precedent to the contrary, on the basis of *dicta* in concurring opinions in *United States v. Guest*, 383 U.S. 745 (1966).[46]

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[45] An earlier decision of the Third Circuit in *Richardson v. Miller*, 446 F.2d 1247 (3d Cir. 1971), is sometimes cited in support of the proposition that violation of fourteenth amendment rights by private persons may be actionable under Section 1985(3) because the plaintiff therein alleged a violation of his first amendment rights. The *Richardson* decision, however, did not consider that issue.

In *Westberry v. Gilman Paper Co.*, 507 F.2d 206 (5th Cir.) *vacated as moot*, 507 F.2d 215 (5th Cir. 1975) (*per curiam*), a Fifth Circuit panel decided that private persons could be held liable for violations of fourteenth amendment rights under Section 1985(3). This opinion was withdrawn by the court *en banc*, however, "so that it will spawn no legal precedents." 507 F.2d at 216. Subsequently, the Fifth Circuit seems to have adopted a much narrower view of Section 1985(3) in *McLellan v. Mississippi Power & Light Co.*, 545 F.2d 919 (5th Cir. 1977) (*en banc*), by requiring that the conspiracy must violate the right involved by "independently unlawful conduct."

[46] In the concurring opinions in *Guest*, six Justices (Warren, Black, Douglas, Clark, Brennan and Fortas) expressed the general view that Section 5 of the fourteenth amendment empowers Congress to pass laws punishing all conspiracies which interfere with the exercise of fourteenth amendment rights. These views, however, were strictly *dicta* since the plurality opinion found the presence of state action on the facts of the case.

As a result of its reliance on the *Guest dicta* alone, the superficial rationale developed in *Action* has been severely criticized by commentators and courts alike. *See, e.g.*, Note, *Application of 42 U.S.C. § 1985(3)*, 47 N.Y.U. L. Rev. 584 (1972); Note, *Federal Power To Regulate Private Discrimination*, 74 Colum. L. Rev. 449, 516 (1974); Note, *Private Interference With An Individual's Civil Rights: A Redressable Wrong Under § 5 Of The Fourteenth Amendment*, 51 Notre Dame Law. 120, 134 (1975); Note, *The Scope of Section 1985(3) Since Griffin v. Breckenridge*, 45 Geo. Wash. L. Rev. 239 (1977); *Bellamy, supra; Murphy, supra.*

One of the primary problems with the reasoning in *Action* is its assumption of the determinative question—even if Congress has the power to legislate proscriptions against individual violations of fourteenth amendment rights, was Section 1985(3) intended to be such legislation?

As previously discussed, however, 1985(3) is purely *remedial* and cannot be interpreted as substantive legislation which extends the Bill of Rights to proscribe private conduct. Section 1985(3), therefore, must look to the provision of another source for the right to be vindicated, and if that source is the fourteenth amendment, state action must be present. *Bellamy, supra*, 508 F.2d at 507; *Murphy, supra*, 543 F.2d at 1193.

In *District of Columbia v. Carter*, 409 U.S. 418 (1973), this Court held that "the commands of the Fourteenth Amendment are addressed only to the state or those acting under color of its authority." *Id.* at 423. Mr. Justice Brennan, speaking for the Court, noted that his concurrence in *Guest* is limited to the proposition that Congress *may* proscribe purely private conduct under Section 5 of the fourteenth amendment. *Id.* at 424 n. 8. Significantly, however, 42 U.S.C. § 1983 was held in *Carter* not to be such a proscription.

There is likewise no basis for interpreting 42 U.S.C. § 1985(3) as a proscription of private interference with first or fourteenth amendment rights.

Even though sex is a cognizable class under the fourteenth amendment (*Frontiero, supra*) and one may have a right to be free from sex discrimination in *public* employment under the fourteenth amendment (*Cleveland Board of Education v. La Fleur*, 414 U.S. 632 (1973)), there is no basis for holding alleged sex discrimination in *private* employment actionable under the fourteenth amendment and, therefore, no basis for holding sex discrimination in private employment actionable under Section 1985(3).

As the Ninth Circuit concluded in *Lopez, supra:*

> We do not think that a constitutional right to be free from discrimination when seeking public employment coupled with § 1985(3) translates into a right to be free from discrimination when seeking private employment. The benefit of the constitutional right in relation to the state is protected by discrimination-free public hiring and is relatively divorced from private hiring decisions; in that light we think § 1985(3) can at most be read to prohibit discriminatory private interference in public hiring.

523 F.2d at 927 n. 3. *See also Doski, supra*, 539 F.2d at 1333 ("[W]e hold that totally private employment discrimination on the basis of sex does not state a cause of action under 42 U.S.C. § 1985(3) for violation of rights flowing directly and exclusively from the Fourteenth Amendment").

There is no constitutional source of power, therefore, to reach a private conspiracy to deny women equal employment opportunity under Section 1985(3).

Conclusion

For the foregoing reasons, Petitioners respectfully request that the opinion and order entered by the United States Court of Appeals for the Third Circuit in this matter be reversed.

Respectfully submitted,

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FOR ARGUMENT

In the Supreme Court of the United States

October Term, 1978

No. 78-753

GREAT AMERICAN FEDERAL SAVINGS & LOAN ASSOCIATION, JOHN A. VIROSTEK, JOSEPH E. BUGEL, JOHN J. DRAVECKY, DANIEL T. KUBASAK, EDWARD J. LESKO, JAMES E. ORRIS, JOSEPH A. PROKOPOVITSH, JOHN G. MICENKO, and FRANK J. VANEK,
Petitioners,

v.

JOHN R. NOVOTNY,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

Brief for Respondent

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QUESTIONS PRESENTED

The United States Court of Appeals for the Third Circuit has held that corporate officers and directors may be held liable as individuals under 42 U.S.C. 1985(3) for harm caused by their conspiracy to deprive women of rights granted to them under Title VII of the Civil Rights Act of 1964, passed pursuant to congressional power under the commerce clause. The questions presented are:

1. Whether individual corporate officers are immune from liability for their conspiratorial discriminatory conduct merely because they acted on behalf of a single business entity.

2. Whether the prohibition against conspiracies to deprive others of federal rights fails to cover deprivations of statutorily created rights under Title VII of the Civil Rights Act of 1964.

3. Whether Congress has the constitutional authority under the commerce clause or other constitutional provision to prohibit conspiracies to deprive women of rights granted under Title VII of the Civil Rights Act of 1964.

COUNTER STATEMENT OF THE CASE

John Novotny (hereinafter called "Novotny"), having been fired from his job after almost fifteen years as an employee, brought suit in the United States District Court for the Western District of Pennsylvania against Great American Federal Savings and Loan Association (hereinafter called "Association") and nine of the Association's officers and directors (hereinafter called "Directors") (Appendix A to Brief for Petitioners on Writ of Certiorari at 1-7, hereinafter cited as Br. App. A).

The suit sought damages, attorneys fees and injunctive relief for the wrongful discharge which Novotny claimed

violated provisions of Title VII of the Civil Rights Act of 1964 and which was accomplished in violation of 42 U.S.C. §1985(3) (Br. App. A at 7).

His complaint accused the Association and Directors of instituting and perpetuating a pattern of discriminatory conduct which denied to female employees equality with male employees in job promotion and advancement (Br. App. A at 3).

The pattern was characterized in the complaint, *inter alia*, by the Association's failure to promote women with greater experience and qualification than the men who were promoted, providing training to male employees but not to females, telling male employees about job vacancies women were not told about, and generally creating and maintaining an atmosphere hostile to the advancement of women in the Association's employ (Br. App. A at 3-4).

As a result of the course of conduct complained of by Novotny, a female employee was demoted and was replaced by a less qualified male. The demotion launched a verbal protest by several of the Association's female employees which, in turn, resulted in the termination of one of them, although she was rehired after being required to submit a letter of apology to the Association's officers and directors (Br. App. A at 4-5).

During one of the bi-monthly meetings of the Board of Directors, of which he was the secretary, Novotny registered his own objection to the termination of the female employee and expressed his general support for the women who had protested the sex-based discriminatory employment practices of the Association (Br. App. A at 5).

In addition, he sought to advise the board members of the Association's obligations regarding equal employment opportunity.

Novotny's district court complaint alleged that his termination bore no relation to the manner in which he carried out his duties, but occurred solely as a result of his support of the women who had protested the Association's discriminatory policies and because, as a management member, he would have been in a position to implement practices and procedures which would have provided equal opportunity for them (Br. App. A at 6).

Novotny further contended that his termination occurred as a result of a conspiracy among the other members of the board to perpetuate the discriminatory practices (Br. App. A at 6).

Shortly after his termination, Novotny also pursued a claim under Title VII which he filed with the Equal Employment Opportunity Commission. The EEOC, on December 9, 1976, issued him a letter granting his right to sue. This claim was combined with the §1985(3) claim when suit was filed in the district court.

Following the filing by the Association of a motion to dismiss, the district court, relying in part on the "single business entity" rationale of *Dombrowski v. Dowling*, 459 F.2d 190 (7th Cir. 1972), dismissed the complaint.

On appeal to the United States Court of Appeals for the Third Circuit, the parties, following argument before a three judge panel, were directed to file supplemental briefs on issues relating to the statutory scope of §1985(3) and Novotny's standing as a male to raise claims concerning discrimination against members of a class to which he did not belong.

The appeal occasioned a complete review by the circuit court of the purposes, history and scope of §1985(3). On August 7, 1978, the circuit court reversed the district court and ordered the case remanded for proceedings consistent with the opinion.

The court held, among other things, that women were not excluded from the protection of §1985(3), that discrimination against women is invidious, class-based discrimination and that Novotny, even though a male, had standing to raise a claim for damages suffered by him as a result of a conspiracy prohibited under §1985(3).

The court also held that the conspiratorial interference with a right granted under Title VII of the Civil Rights Act of 1964 could form the basis of a §1985(3) claim, that Congress had the power to legislate against such a conspiracy, and that §1985(3) and Title VII did not conflict.

Finally, the court held that individual corporate officers who conspired to deprive others of civil rights were not immune from liability for damages which resulted therefrom just because they were acting on behalf of a single business entity (the court also dealt with an issue, not relevant here, concerning the interpretation of §704(a) of Title VII).

SUMMARY OF ARGUMENT

1. Statutory Scope.

The statutory language, when accorded its apparent meaning and read against the legislative history, indicates that women were included in the protections afforded by 42 U.S.C. §1985(3) and entitled to equal treatment in the exercise of their civil rights.

In addition, this Court, in recent decisions beginning with *Craig v. Boren*, 429 U.S. 190 (1976), has exhibited a willingness to thoroughly scrutinize discriminatory enactments the benefits of which appear to depend on gender, recognizing that such classifications can stand only if they serve some important governmental objectives and are substantially related to the achievement of those objectives.

Moreover, congressional declarations make it clear that women are subject to economic deprivations as a class and

that discrimination against them is to be accorded the same degree of social concern as any other type of unlawful discrimination. In addition, sex discrimination has already been termed at least "invidious" in *Frontiero v. Richardson*, 411 U.S. 677 (1973), citing *Reed v. Reed*, 404 U.S. 71 (1971).

2. Corporate Conspiracies.

Individual corporate officers must be held liable for the consequences of their conspiratorial interferences with the federal rights of others. Nothing in the wording or history of §1985(3) suggests an immunity for corporate officers who violate the Act, even when those officers act on behalf of the corporation. Nor is there anything inherent in the corporate business form which suggests that ordinary agency and tort principles should not apply to conspiracies by corporate officers to violate federal civil rights law. Those principles have always held corporate agents liable for the consequences of their intentional or negligent tortious conduct. Moreover, the doctrine of *respondeat superior*, which makes the principal liable *as well as* the agent, provides no immunity shield to corporate officers since the doctrine is a remedy-expanding one and provides the best opportunity to the victim to recover by making both the agent and principal liable. In addition, any distinction between civil and criminal conspiracy is irrelevant to the issue of immunity for corporate officers and agents since in neither can the agent be responsible merely by virtue of the position he or she holds.

Cases which suggest that corporate officers should be immune seem to rely, in part, on principles of antitrust law which should not be applied to civil rights violations. While certain antitrust conspiracies require more than one business entity, civil rights violations may always be accomplished by individuals. Cases such as *Dombrowski v. Dowling*, 459 F.2d 190 (7th Cir. 1972), therefore, which apply the immunity, impose an artificial barrier to the enforcement of a remedial statute.

3. Federal Statutory Right.

A conspiracy to deprive persons of federal rights includes a conspiracy to deprive of rights created by federal statute. Such statutorily created rights have been protected from conspiracies at least since this Court's opinion in *United States v. Waddell*, 112 U.S. 76 (1884). Title VII of the Civil Rights Act of 1964 is one such federal statute which did not render unavailable other federal remedies such as §1985(3). Moreover, the availability of independent federal remedies would not result in a disastrous multiplication of federal court actions. Congress recognized the attractiveness of choice for persons discriminated against and intended to maintain that choice for the limited number of protected classes. Furthermore, cases relied upon by the Directors may be distinguished on the ground that Congress exhibited the specific intent to create exclusive remedies in some instances but not in others.

4. Sources of Constitutional Power.

Novotny contends that at least two sources exist for the right enforced by Congress through §1985(3). Novotny contends that the constitutional basis for the right created in the instant case is the commerce clause which gave rise to Title VII of the Civil Rights Act of 1964. Accordingly, Congress could protect that right against conspiratorial interference.

In addition, Novotny suggests that the inability to contract equally for the sale of one's labor is a badge or incident of slavery rendered unlawful by the thirteenth amendment. Since the thirteenth amendment may be enforced against private individuals on behalf of *all* people, Congress had the power to legislate against private conspiracies to impose on any persons badges and incidents of slavery.

ARGUMENT

I. ACCORDING §1985(3) ITS APPARENT MEANING CONFIRMS ITS APPLICATION TO WOMEN IN THIS CASE.

A. Civil Rights Statutes, Including §1985(3), Are To Be Broadly Construed And Accorded Their Apparent Meaning.

Initially, some general rules concerning the construction of civil rights statutes, particularly §1985(3), bear reviewing.

When this Court breathed new life into §1985(3) in *Griffin v. Breckenridge*, 403 U.S. 88 (1971), it erected signposts of statutory construction which might be followed with confidence by subsequent litigants.

Declining to determine whether *Collins v. Hardyman*, 341 U.S. 651 (1951) had been correctly decided on its facts twenty years earlier, this Court noted that "[l]ittle reason remains...not to accord to the words of the statute their apparent meaning." 403 U.S. at 96.

The Court then proceeded to examine the words of the statute for the meanings apparent "on their face," and to determine whether any inherent limitations acted to prevent enforcement in a manner consistent with those words. *Id.* at 97.

"The approach of this Court to other Reconstruction civil rights statutes in the years since *Collins* has been to 'accord [them] a sweep as broad as [their] language.'" *Id.* at 98.

Following a review of the text of §1985(3), the Court proceeded to confirm the meaning by reference to companion provisions and legislative history as it is contained in the congressional debates set out in the *Congressional Globe*.

B. The Text And Legislative History Of §1985(3) Support The Conclusion That It Was Intended To Protect All Persons—Including Women—From Deprivations Of Equal Protections Afforded By The Constitution Or Any Law Of The United States.

The text of §1985(3), set out in the footnote below[1] as cited in *Griffin* but with the lines numbered for ease of reference, seems certainly to apply the protection of the statute to women.

In the court below, the Directors argued in their brief that the word "person," in line 4 of the cited statute, did not include women (Supplemental Brief for Defendants-Appellees at 14, 584 F.2d 1235 (3d Cir. 1978)) and that Congress could not have contemplated the inclusion of women under the statute because women did not have some of the rights which Congress sought to protect.

Congress, however, used the words "any person or class of persons" and attached no limitation or qualification to those words.

Representative Kerr, who did not speak in favor of the passage of the Civil Rights Act of 1871, nevertheless understood that "whatever rights, privileges and immunities attach to and inhere in the citizen or citizens of the United States must belong to all alike. They must belong equally to man and woman, to adult and infant, to sane and insane, to black and white." *Cong. Globe*, 42d Cong., 1st Sess. at H. App. 47 (March 28, 1871). If this, from Representative Kerr, was an accusation, it was not denied.

[1] 42 U.S.C. §1985(3) (as cited in *Griffin*, 402 U.S. at 92):

If two or more persons in any State or Territory
conspire or go in disguise on the highway or on the
premises of another, for the purpose of depriving,
either directly or indirectly, any person or class of
persons of the equal protection of the laws, or of
equal privileges and immunities under the laws [and]
in any case of conspiracy set forth in this section,
if one or more persons engaged therein do, or cause
to be done, any act in furtherance of the object of
such conspiracy, whereby another is injured in his
person or property, or deprived of having and exercising any right or privilege of a citizen of the United
States, the party so injured or deprived may have
an action for the recovery of damages, occasioned by
such injury or deprivation, against any one or more
of the conspirators.

That the legislators recognized a difference between civil rights, which were included in "privileges and immunities," and political rights which were not, correctly suggested to the Third Circuit court, relying on a colloquy between Senator Trumbull and Senator Carpenter, that women were to be included within the scope of §1985(3). Senator Trumbull stated:

> The "privileges and immunities" referred to in the Constitution are of a civil character, applying to civil rights, and not political rights, and were never so understood. The Senator from Wisconsin asks if they [women] are not protected in all the privileges and immunities of citizens of the United States. Undoubtedly; but we have not advanced one step by that admission.

Cong. Globe, *supra*, at 576.

At least two other specific references bespeak the inclusion of women within the protections of §1985(3). Senator Morton pleaded for the security and protection of persons not because they were Republicans, but "because they are human beings; because they are men and women entitled to the protection of the laws...." *Cong. Globe*, *supra*, at S. App. 251. The other reference is that of Representative Kelley, *Cong. Globe*, *supra*, at 339, as cited by the Third Circuit in the instant case (Petition for Writ of Certiorari, Appendix A at 14a, n.24 (hereinafter cited as Pet. App. A; 584 F.2d at 1242 n.24).

In the general language which is more typical of the debates, the legislators who favored passage of the Act appear so emphatic in their use of inclusive wording that one cannot but conclude that if women were to be excluded from the protection of the bill, someone surely would have said so.

Representative Bingham asked:

> [W]hether it is competent for the Congress of the United States, under the Constitution of the United States, in pursuance of its provisions, and in the exercise of the powers vested by it...to provide by law for the enforcement of the Constitution, on behalf of the whole people, the nation, and for the enforcement as well of the Constitution on behalf of every individual citizen of the Republic in every State and Territory of the Union to the extent of the rights guarantied to him by the Constitutions.

Cong. Globe, supra, at App. 81.

Representative Lowe said:

> The cardinal doctrine of our institutions is that all citizens are equal before the law, and that the law shall equally secure to all, their natural and inalienable rights.
>
> • • •

Id. at 374-76.

Similar statements abound throughout the debates, and their force must remove from Novotny the burden of proving their inclusion, demanding of the Directors the opposing burden.

C. Recent Decisions Of This Court Suggest A Heightened Degree Of Scrutiny For Sex-Based Discrimination.

Beginning with its opinion in *Craig v. Boren*, 429 U.S. 190 (1976), this Court has exhibited a willingness to thoroughly scrutinize the purposes allegedly underlying statutes the effects of which depend on sex-based classifications. In *Craig*, this Court required the showing that "classifications by gender...serve important governmental objectives and must be *substantially related* to achievement of those objectives." 429 U.S. at 197 (emphasis added).

Califano v. Goldfarb, 430 U.S. 199 (1977) followed in the wake of *Craig*. This Court again scrutinized the asserted legislative purposes of social security provisions thoroughly enough to determine that the goal of redressing widespread economic discrimination against women could not be accomplished through a statute which was intended to grant benefits on the basis of dependency, not financial need (providing a basis for distinguishing the cases of *Kahn v. Shevin*, 416 U.S. 351 (1974) which found the operation of the statutes in question to accord with the asserted purpose of redressing the serious financial effects of past discrimination). See also *Stanton v. Stanton*, 421 U.S. 7 (1975).

On March 5, 1979, this Court reaffirmed its willingness to thoroughly scrutinize the asserted purposes of a state enactment by declaring unconstitutional the alimony laws of Alabama in *Orr v. Orr*, 47 U.S.L.W. 4224 (March 5, 1979). Citing *Craig* and *Califano v. Webster*, 430 U.S. 313 (1977), this Court determined: (1) that Alabama cannot legislatively express a preference for family role models based on wifely dependency; (2) that Alabama's administrative process already contained the mechanism for determining the relative financial circumstances of the parties so that using sex as a "proxy for need" was unjustifiable; and (3) that the operation of the statute resulted in an unjustifiable benefit to non-needy wives with needy husbands.

The rigorous examination given in these cases by the Court to statutes which grant or withhold benefits on the basis of gender justifies Novotny in his argument to the Court that any such sex-based discrimination should be

treated as an invidious one in the context of a private conspiracy under §1985(3).

D. Congress Has Recognized That Discrimination Against Women Is Class-Based And Invidious.

Since a conspiracy to deprive a person of rights he or she has by virtue of Title VII of the Civil Rights Act is actionable under §1985(3), Novotny suggests that Congress has specifically declared that women comprise a class of persons who may be subject to invidious discrimination.

Not only has Congress made the declaration simply by virtue of making sex discrimination unlawful in 1964, but it also made a specific announcement to this effect in a House Report setting forth the reasons for the 1972 Amendments to the Civil Rights Act of 1964:

> Women are subject to economic deprivation as a class. Their self-fulfillment and development is frustrated because of their sex. Numerous studies have shown that women are placed in the less challenging, the less responsible and the less remunerative positions on the basis of their sex alone.
>
> In recent years, the courts have done much to create a body of law clearly disapproving of sex discrimination in employment. Despite the efforts of the courts and the Commission, discrimination against women continues to be widespread, and is regarded by many as either morally or physiologically justifiable.
>
> This Committee believes that women's rights are not judicial divertissements. Discrimination against women is no less serious than other forms of prohibited employment practices and is to be accorded the same degree of social concern given to any type of unlawful discrimination.

H. R. Rep. No. 92-238, 92d Cong., 2d Sess., *reprinted in* (1972) U.S. Code Cong. News 2137, 2140.

Accordingly, Novotny contends that Congress has declared sex discrimination to be an invidious class-based discrimination, and it is, therefore, actionable under §1985(3) assuming the other elements are met.

E. This Court Has Determined That Sex-Based Discrimination Is, Definitionally, Invidious.

Novotny further suggests that this Court has already determined in a definitional way that sex discrimination is invidious discrimination. Although the Court could not agree that sex constituted a "suspect" classification, at least five members of the Court in *Frontiero*, 411 U.S. 677, specifically determined that sex discrimination was at least invidious.

Four members of the Court, in the *Frontiero* plurality opinion, equated sex discrimination with race discrimination (*Id.* at 685) and specifically pointed out that as a result of the fact that the sex characteristic, like race and national origin, frequently bears no relation to ability, "statutory distinctions between the sexes often have the effect of *invidiously* relegating the entire class of females to inferior legal status without regard to the actual capabilities of its individual members." *Id.* at 686-87 (emphasis added).

In addition, Mr. Justice Stewart, without indicating that he wished to adopt the plurality reasoning, nevertheless agreed that the statutes in question worked "an invidious discrimination in violation of the Constitution" (*Id.* at 691), relying for that determination on *Reed v. Reed*, 404 U.S. 71 (1971), as the plurality had.

In fact, all but one of the members of this Court relied on *Reed*, and if *Reed* can stand for the proposition that class-based sex discrimination is invidious in the equal protection context, if not inherently suspect, then it should be at least equally invidious in the §1985(3) context.

Clearly, there is no difference in the nature of the discrimination alleged in the instant case and that which was the subject of *Reed, Frontiero, Craig, Webster* or *Stanton*. In every case, immutable class characteristics which bore no relationship to the actual abilities, needs or characteristics of the parties were made the criteria for the receipt of a benefit or the imposition of a disability. In regard to race discrimination, this Court has recognized the historically debilitating effect that it has had on the members of the class—and the same is also true of sex discrimination, as this Court has recognized in *Kahn v. Shevin*, 416 U.S. 351, and *Califano v. Webster*, 430 U.S. 313.

In *Griffin*, this Court cited Representative Shellabarger's expansive description of the *animus* required: *animus* the effect of which "is to strike down the citizen, to the end that he may not enjoy equality of rights as contrasted with his and other citizen's rights, shall be within the scope of the remedies of this section." 403 U.S. at 100. The acts and motivations of the Directors, as set forth in Novotny's brief, certainly strike down the female citizen to the end that she may not enjoy such equality of rights.

F. If The Gender-Neutral Language Of 42 U.S.C. §1983 Can Support A Sex Discrimination Claim, §1985(3), Derived From The Same Enactment, May Also.

While this Court has not answered directly whether §1983 specifically reaches sex discrimination, at least two circuit courts have suggested or decided, in the context of §1983 suits, that sex discrimination is so reached by the gender-neutral language of that statute. In *Eslinger v. Thomas*, 476 F.2d 225 (4th Cir. 1973), the Fourth Circuit upheld a §1983 action against state officials who refused on the grounds of sex to hire women as senate pages in the senate of South Carolina. The reasoning of the court followed the reasoning of this Court in *Reed v. Reed, supra*, and seemed not to make

any distinctions based on the manner in which the challenge to the state practice arose.

In *Johnson v. City of Cincinnati*, 450 F.2d 796 (6th Cir. 1971), the court, in the context of §1983, suggested that the rational relationship test be applied to a suit by a woman prohibited because of her sex from seeking a position as a housing inspector.

In addition, *Craig*, 429 U.S. 190, was originally brought under §1983 (399 F.Supp. 1304).

Both §1983 and §1985(3) evolved from the Civil Rights Act of 1871. This Court has held that the fact that two statutes derive from the same source is some reason to conclude that they are related and even complementary. *Examining Board of Engineers, Architects & Surveyors v. Flores deOtero*, 426 U.S. 572 (1976). Accordingly, if the gender-neutral language in §1983 can support sex-discrimination claims, there is no reason to believe that women were not included within the protective scope of §1985(3).

There can be no question that discrimination based on sex is class-based. The conclusion that Novotny draws from the treatment accorded such discrimination by members of this Court is that it is at least invidious since the effect of it is to deprive persons of equal treatment under law.

II. CORPORATE DIRECTORS WHO CONSPIRE TO DEPRIVE OTHERS OF CIVIL RIGHTS UNDER FEDERAL LAW ARE NOT IMMUNE FROM PERSONAL LIABILITY FOR THE DAMAGE THEY CAUSE.

The complaint which initiated the instant action charged, among other things, that the Directors, defendants in the district court, intentionally embarked upon a course of conduct to deny to female employees equal employment

opportunity (Br. App. A at 3-4, ¶¶16, 17), and that Novotny was fired from his job not only because he openly opposed that course of conduct, but because he was, prior to his discharge, in a position, as a management employee and member of the Board of Directors, to affect the actions of the conspirators and to implement equal employment opportunities (Br. App. A at 5-6, ¶¶22, 25, 26, 27).

Paragraph 33 of the complaint (Br. App. A at 7) set forth that the "individual defendants were and are acting on behalf of GAF."

The Directors argue, essentially, that: (a) a corporation can only act through its agents and that therefore the agents of a single corporation cannot conspire when they act on behalf of the corporation; (b) the principles of conspiracy law applicable to a criminal case are inapplicable to a §1985(3) case; and (c) since the corporation was not formed *for the purpose* of fostering sex discrimination, those courts following *Dombrowski v. Dowling*, 459 F.2d 190, are correct.

A. The Nature Of The Corporate Form Provides No Shield To The Personal Liability Of Corporate Officers And Agents Who Conspire To Deprive Others Of Rights Under Federal Law.

The Third Circuit, initially looking, as it should, to the wording of the statute, determined that the sole issue was "whether concerted action by officers and employees of a corporation, with the object of violating a federal statute, can be the basis of a §1985(3) complaint" (Pet. App. A at 52a-53a; 584 F.2d at 1258), and indeed the wording of the statute gives no reason to conclude that the existence of the corporate form immunizes the individuals who are directors or agents from responsibility for acts for which they would be responsible ordinarily. When Congress wrote, "If two or

more persons in any State or Territory conspire . . ." there is no reason, as the Third Circuit recognized, to believe that the word "person" carried anything other than its natural meaning. Certainly, corporations do not "go in disguise" or use "force, intimidation or threat." Moreover, there is no indication that the word "person" in the fourth line of the statute as set forth in footnote 1 of this brief, is used any differently than the plural of the word in the fifth line, and there is nothing in the statute or the legislative history to lead to the conclusion that corporations were "persons" to be protected from deprivation of equal protection of the laws (lines 10 and 11, footnote 1). There is, in other words, nothing in the statute or the legislative history to lead to the conclusion that corporations were "persons" to be either protected or punished. Accordingly, nothing in the statute or the legislative history, said the Third Circuit, justifies the imposition of corporate form as a condition on the enforceability of §1985(3) on natural persons.

Despite the apparent language of the statute, the Directors suggest, beginning at page 11 of their brief, that the very nature of corporate structure and the principles of *respondeat superior* compel the conclusion that the agents and officers acting on behalf of a single corporation cannot form a conspiracy.

Novotny respectfully maintains, however, that the arguments of the Directors in this regard are unpersuasive and constitute a perversion of the law of principal and agent.

For example, Novotny suggests that the quotation from *Trustees of Dartmouth College v. Woodward*, 17 U.S. (4 Wheat.) 518 (1819), beginning on page 11 of the Directors' brief, actually supports Novotny's notion of the corporation as a fiction whose purpose should not be extended beyond the transactional necessities of the marketplace, and its usefulness as a business tool does not require that it constitute a

shield of immunity for corporate directors who knowingly conspire to violate the law (whether civil rights or otherwise).

Several people may be considered by the law to act as a single entity so that it may manage its affairs in perpetuity as individual directors change, but the fact that a "corporation is an artificial person which can only act through its officers, directors, and other agents" (Brief for Petitioners on Writ of Certiorari at 12, hereinafter cited as Pet. Br.) does not require that those agents be absolved of responsibility for their own intentionally conspiratorial or even negligent acts, which responsibility the law traditionally placed on them. Even if we are to accept the theories of corporate existence as quoted by the Directors, the corporate form need be respected only insofar as it is necessary or desireable to do so for legitimate business activities. To the extent that such activities are illegitimate or tortious, there is nothing inherent in the corporate form which insulates the agents.

There is, however, a legal device, the doctrine of *respondeat superior*, which makes the corporation liable *as well as* the agents, but any suggestion by the Directors that *only* the corporate principal is liable to an injured party as a result of the wrongful acts of the agents is erroneous. *Cf. Restatement (Second) of Agency*, §§343-359 (1957); 3A Fletcher, *Cyclopedia of the Law of Private Corporations* (hereinafter cited as *Cyclopedia of Corporations*) §§1135, 1138, 1143; *Peck v. Cooper*, 112 Ill. 192, 54 Am.Rep. 231 (1884).

Again, Novotny has no quarrel with the general statement of the economic rationale behind the principle of *respondeat superior* set forth in note 5 on page 13 of the Directors' brief. It simply does not, however, say anything about individual or group immunity for unlawful corporate decisions by agents thereof. *Respondeat superior* is a

remedy-expanding doctrine. Under it, the principal is liable where only the agent was before. To suggest now that the doctrine may be cited as a justification for *limiting* the available remedies to the principal perverts the doctrine. There are times when the corporation is without assets but the corporate agents are not. The proper effect of the doctrine is to permit the victim to go against both or either.[2]

If, of course, the focus of civil conspiracy is not on the agreement to conspire but on compensating for the harmful results, as the Directors suggest on page 14 of their brief, then it certainly makes no sense to deprive the victim of remedies against the individuals who are responsible for the injury and who may collectively be able to bear the cost of the damages suffered.

The attempt of the Directors, on page 14 of their brief, to distinguish between two situations—where no corporation is involved and where one is involved—is, Novotny contends, patently absurd. If the Directors are really concerned with the "best opportunity" of the victim "to recover fully," then certainly, where no corporation is involved, the best opportunity is against the individuals because it is the *only* opportunity, there being no other legal entity from which to recover. Where a corporation is involved, obviously the "best opportunity to recover fully" is to be able to go against *both* the individuals and the corporation. Surely the Directors' suggestion, on page 14, that "the civil conspiracy's pur-

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[2]*See* Pet. Br. at 13 n. 6. One of the *primary* purposes, of course, for incorporation in the first instance is to shield individuals from business-related liability. Novotny suggests that undercapitalized corporations are not "relatively rare," but occur with sufficient frequency to warrant the concern of a lawyer asserting a claim on behalf of a client. Moreover, whether or not a corporation begins its fictional life in fiscal anemia, many corporations simply do not prosper and are execution proof at the time litigation arises.

pose of providing the most effective relief for victims is also effectuated" because of the corporation's vicarious liability, is self-serving and unfounded.

The Directors argue on page 15 of their brief that a rule that a corporation can conspire with its agents ignores reality. Novotny points out, however, that his original complaint does not allege a conspiracy between the agents and the corporation as the Third Circuit court recognized (Pet. App. A at 52a).. An agent *can*, however, conspire with another agent, and *that* is the reality of the instant case. Since, under traditional theories of *respondeat superior*, an agent was also liable with the corporate principal, is it not a fiction to say that two agents are immune simply because they planned their unlawful activities together?

General principles of corporate law suggest clearly that corporate directors or officers are liable for their negligently or intentionally tortious conduct and fraudulent acts and representations to persons who are injured as a result of them. 3A Fletcher, *Cyclopedia of Corporations*, §§1135, 1143; 19 C.J.S. *Corporations* §850 (1940). Moreover, the liability of corporate directors in such a situation is joint and several. 3A Fletcher, *supra*, §1138; *Schwartz v. Century Circuit, Inc.*, 39 Del. Ch. 340, 163 A.2d 793 (1960); *Hines v. Wilson*, 164 Ga. 888, 139 S.E. 802 (1927). Corporate directors, in other words, are no more immune from actions for their false statements which result in injury than any other individuals. 3A Fletcher, *supra*, §1143; 19 C.J.S. *Corporations* §850 (1940). They are not relieved of liability because they acted for the benefit of the corporation and the corporation is also liable. 9 Fletcher, *supra*, §4255.

In analogous situations involving intentionally tortious conduct, agents and directors of corporations have been held responsible for conspiracies to slander third persons by publishing false statements for the purpose of injuring

another in his business relationships.[3] And in such circumstances, both the officers *and* the corporation may be joined in the action. *Schoedler v. Motometer, supra* note 3.

Of course, as Novotny has pointed out above, the theory of *respondeat superior* acts to make the corporation liable as well for the torts of its agents committed within the scope of their express, implied or apparent authority. *Aetna Life Insurance Co. v. Mutual Benefit Health & Accident Association*, 82 F.2d 115 (8th Cir. 1936); *White v. Central Dispensary & Emergency Hospital*, 99 F.2d 355 (D.C. Cir. 1938); *VanZandt v. Bergen County*, 79 F.2d 506 (3d Cir. 1935). Furthermore, the general rule applies even if the agents have been guilty of wanton, malicious, willful or even criminal conduct as long as the conduct is within the scope of employment. 19 C.J.S. *Corporations* §1263 (1940); *Finnish Temperance Society Sovittaja v. Publishing Co.*, 238 Mass. 345, 130 N.E. 845 (1921); *W. T. Grant Co. v. Owens*, 149 Va. 906, 141 S.E. 860 (1928).

Accordingly, if the officers of corporations are *not* to be held liable for their conspiratorial conduct committed within their corporate authority, such immunity must be found someplace other than in the "artificial," "invisible," "intangible" and fictional corporate nature and may certainly not be found in the doctrine of *respondeat superior*. *See* Note, *Intracorporate Conspiracies Under 42 U.S.C. §1985(c)*, 92 Harv. L. Rev. 470 (1978).

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[3] *George v. Georgia Power Co.*, 43 Ga. App. 596, 159 S.E. 756 (1931) (conspiracy among corporate agents to write and receive a letter containing false statements injurious to a third person); *Schoedler v. Motometer Gauge & Equipment Corp.*, 134 Ohio St. 78, 15 N.E.2d 958 (1938) (corporate officers conspired to slander the president of another corporation in order to acquire his business and property). *See also Nottingham v. Wrigley*, 221 Ga. 386, 144 S.E.2d 749 (1965) (corporate officers held individually liable for a conspiracy to terminate employment contract of corporate employees).

B. Differences Between Civil And Criminal Conspiracy Do Not Justify Immunity Of Corporate Officers And Agents From Personal Liability For Their Conspiracy To Deprive Others Of Federal Constitutional Rights.

In interpreting §1985(3) in a manner consistent with the apparent intent of Congress to avoid the creation of a "general federal tort law," this Court imposed as an element of the cause of action a certain *mens rea* which it both named and described as an "invidiously discriminatory animus." *Griffin*, 403 U.S. at 102.

Making further reference to it as a "motivation requirement," the Court warned against confusing it with the "'specific intent to deprive a person of a federal right made definite by decision or other rule of law' articulated by the plurality opinion in *Screws v. United States*, 325 U.S. 91, 103, for prosecutions under 18 U.S.C. §242." *Griffin*, 403 U.S. at 102 n. 10.

Section §1985(3), the Court said, contains no specific requirement of "willfulness." *Id.* All that is required is that the conspirators have a general purpose to deprive a person, because of his or her membership in a class of persons, of equal enjoyment of rights secured by law to all. The conspirators need not intend to deprive one of a specific right, as required in *Screws*, and need not intend the specific harm accomplished.

It is apparently this distinction which the Directors seek to exploit in their argument beginning on page 16 of their brief.

Why such a distinction inures to the benefit of the Directors is unclear, in Novotny's opinion.

Even though the agreement itself is the "gravamen of the offense of criminal conspiracy," this has nothing at all to

do with the Directors' assertion that "[l]iability under a criminal conspiracy theory . . . is imposed on a strictly individualized basis." (Pet. Br. at 17). Axiomatic in the general body of corporate law is the proposition that a corporate officer may not be held liable merely by virtue of his office. 19 C.J.S. *Corporations* §845 (1940); 3A Fletcher, *Cyclopedia of Corporations*, §1137. A director, officer or agent is liable for the torts of the corporation or of other directors, officers, or agents when, *and only when*, he or she has participated in the tortious act, or has authorized or directed it, or has acted in his or her own behalf, or has had any knowledge of, or given consent to, the act or transaction, when he or she either knew or by the exercise of reasonable care should have known of it and should have objected and taken steps to prevent it. 19 C.J.S. *Corporations* §§845, 850 (1940); 3A Fletcher, *supra*, §1137.

If an individual is "never presumed liable because of a position which he or she occupies" in criminal conspiracy theory (Pet. Br. at 17), neither is he or she so presumed in a civil conspiracy.

Nor is there any solace for the Directors in the idea that civil conspiracy is intended to remedy the harm suffered whereas criminal conspiracy is to be punished.

That §1985(3) was intended to remedy harm, there can be no question,[4] but this speaks in *favor* of a remedy against the individuals.

This Court appears to have indicated that civil rights actions by private persons sound in tort. *Cf.* Note, *Intracorporate Conspiracies Under 42 U.S.C. §1985(c)*, 92 Harv. L. Rev. at 486 n. 91. If, therefore, the purpose of civil conspir-

[4] ". . . the party so injured or deprived may have an action for the recovery of damages, occasioned by such injury or deprivation. . ." 42 U.S.C. §1985(3), lines 13, 14, n.1, above.

acy in general is to provide a tort remedy for persons harmed as a result of a class-based animus, and if §1985(3) exhibits in its language just such a purpose, there is no logic in applying that remedial purpose to deprive the injured persons of responsible parties to contribute to the remedy. If indeed the purpose of civil conspiracy actions is to provide a remedy to injured parties, as the Directors contend, such purpose cannot justify immunity for agents.

The basic distinction between civil and criminal conspiracy, in fact, has no relationship at all to the issue of immunity for officers and directors of a single corporation who conspire on its behalf (As set forth above, the compensatory purpose of civil conspiracy militates *against* such immunity). The basic distinction—related to the compensatory purpose of all tort law—it that civil conspiracy requires an act[5] which results in harm, whereas in criminal conspiracy, the harm need not be accomplished. This distinction does not appear to have anything to do with the "specific intent" requirement, contrary to the assertion of the Directors. It has to do simply with the fundamental concept of civil law: only one who has been damaged may maintain an action in tort and it ordinarily requires some act to cause damage. If civil conspiracy is to be actionable, it must have resulted in damage. "Unlike a criminal conspiracy, the existence of a civil conspiracy depends entirely upon the character of the acts following an unlawful combination." Comment, *Civil Conspiracy and Interference with Contractual Relations*, 8 Loy. L.A.L. Rev. 302, 306 (1975). Criminal conspiracy may be punished, however, even if the acts agreed upon are never committed and no harm occurs.

[5]Not necessarily to be confused with the very minimal "overt act" requirement of the federal and state criminal conspiracy statutes. *Cf.* Comment, *Developments in the Law—Criminal Conspiracy*, 72 Harv. L. Rev. 920, 945-46 (1959).

Nevertheless, while it is necessary to prove damages to prevail in a civil conspiracy case, both types of conspiracy, civil and criminal, are frequently defined as an agreement between two or more persons to do a criminal or otherwise unlawful act or to do a lawful act by criminal or unlawful means. Burdick, *Conspiracy as a Crime and as a Tort*, 7 Colum. L. Rev. 229 (1907). Nothing in their common elements would suggest that civil conspirators may claim any exemption from the tort law principle that persons must bear the consequences of their own voluntary acts.

The Third Circuit did indeed cite, in support of its decision on the conspiracy issue, some criminal conspiracy cases (Pet. App. A at 53a-54a; 584 F.2d at 1258), as the Directors have pointed out in their brief (Pet. Br. at 16 n. 9, and accompanying text). The court did not rely *solely* upon criminal cases, however, and cited this Court's opinion in *Pennsylvania R.R. System & Allied Lines, Fed. No. 90 v. Pennsylvania R.R. Co.*, 267 U.S. 203 (1925), as support for the concept of a conspiracy composed of corporate officers.

Had the Third Circuit relied solely on criminal cases, however, its reliance would not be misplaced since the evils of conspiracy, as summarized by Justice Frankfurter in *Callanan v. United States*, 364 U.S. 587 (1961), and cited in the Directors' brief at page 19, are the same, whether the conspiracy results in civil or criminal sanction. The argument of the Directors, in other words, based on Justice Frankfurter's summarization, is an artificial contrivance that has no basis in law. Every danger set forth by Justice Frankfurter exists in a civil conspiracy except that the ultimate harm is civil damage instead of a criminal act. Moreover, of course, Congress in fact legislated criminal sanctions for the same kind of conspiracies in 18 U.S.C. §241, a fact overlooked by the Directors.

While the Directors suggest (erroneously, Novotny believes) that the number of officers involved did not

increase the potential harm to the public (Pet. Br. at 20), Novotny suggests the obverse: the fact that the officers and directors conspired on behalf of a corporation did not *lessen* the potential for the harm to the public.

Accordingly, Novotny suggests that the Directors' analysis which distinguishes civil from criminal conspiracy does not warrant a reversal of the circuit court.

C. The Law Of Corporate Conspiracy As Set Forth In Dombrowski v. Dowling Should Not Be Adopted By This Court.

While the Directors suggest that the distinction between civil and criminal conspiracies somehow explain why every other circuit court except the Third has ruled that officers and directors of a corporation cannot form a §1985(3) conspiracy (Pet. Br. at 21), Novotny notes that in *Dombrowski v. Dowling*, 459 F.2d 190, no such analysis appears. Nor does it appear in any of the other cases cited by the Directors on page 22 of their brief. No such analysis appears, Novotny respectfully suggests, because it is inapposite to the issue.

The Directors suggest that because the corporation was not formed specifically for the *purpose* of discrimination, piercing the corporate veil serves no function in this instance. For this proposition, the Directors rely upon *Dombrowski* and its interpretation in *Cole v. University of Hartford*, 391 F.Supp. 888 (D.Conn. 1975), and obviously assume that corporate officers who are intent on discriminating will publicly announce their "avowedly discriminatory purposes." (Pet. Br. at 24).

Novotny respectfully suggests, however, that *Dombrowski* and the cases it has spawned espouse a view of corporate existence useful for some aspect of business marketplace but not extendable to the interpretation of civil rights legislation.

Courts which have considered but failed to apply *Dombrowski* have generally made factual distinctions based on the nature or number of acts perpetrated by the corporate defendants, and/or the size and nature of the corporation itself. In *Rackin v. University of Pennsylvania*, 386 F.Supp. 992 (E.D. Pa. 1974), the court held *Dombrowski* inapplicable where the plaintiff alleged many continuing instances of discrimination and harassing treatment by the alleged conspirators. Such allegations constituted more than the "essentially...single act of discrimination by a single business entity" which was crucial to *Dombrowski*. 386 F.Supp. at 1005-06. Defendants raised the identical argument in *Jackson v. University of Pittsburgh*, 405 F.Supp. 607 (W.D. Pa. 1975), but Judge Scalera chose to follow *Rackin* and *Johnston v. Baker*, 445 F.2d 424 (3d Cir. 1971), and denied defendant's motion to dismiss the §1985(3) claims, which motion was based on the ground that actions of university officials were actions of a single entity.

In *Dupree v. Hertz Corp.*, 419 F.Supp. 764 (E.D. Pa. 1976), Judge Newcomer attempted to reconcile the seemingly inconsistent decisions on whether a complaint naming corporate officials as conspirators states a cause of action under §1985(3):

> These cases indicate that the size of the corporation, the number of acts of discrimination, and the number of persons or entities involved in making corporate decisions must be considered in applying §1985(3) to a single firm conspiracy. Here the defendant [Hertz Corporation] is a very large corporation with numerous separate offices, the Complaint alleges a broad policy of discrimination rather than a single discriminatory act, and the plaintiff is not challenging a specific, formally adopted corporate policy...These allegations bring this case closer to the factual situation in *Rackin v. University of Pennsylvania* than to the facts in the *Girard* and *Dombrowski* line of cases.

419 F.Supp. at 766.

Finally, in *Beamon v. W.B. Saunders Co.*, 413 F.Supp. 1167 (E.D. Pa. 1976), Judge Fullam refused to accept the *Dombrowski* line of reasoning to support a motion to dismiss:

> [W]hile I recognize that the lower courts have taken inconsistent positions with respect to the question of whether officials of a single corporation can conspire with one another, I am not disposed to dismiss the §1985(3) claim at this point in the proceedings. Presentation of evidence on questions such as the number of business entities or individuals involved, should be taken before undertaking the ambitious task of attempting to define the constitutional scope of §1985(3).

413 F.Supp. at 1176-77.

Novotny contends, however, that the *Dombrowski* rationale represents a transplant from antitrust theories of conspiracy[6] which have no place in civil rights law. In other words, Novotny suggests that although two or more corporate officers or employees acting on behalf of a *single* business entity may not be able to accomplish the harm to be prevented by antitrust conspiracy law unless they involve another competing business entity, two or more corporate officers or employees acting on behalf of a single business entity *can* accomplish the harms to be prevented by civil rights law *without* involving another business entity.

Novotny compares antitrust conspiracy to civil rights conspiracy because, in general, some courts which have avoided finding the existence of a §1985(3) conspiracy by the agents of a single business entity seem largely to have relied upon antitrust theory as set forth in *Nelson Radio & Supply Co. v. Motorola, Inc.*, *supra* note 6. *Nelson* was cited

[6]As evidenced in *Nelson Radio & Supply Co. v. Motorola, Inc.*, 200 F.2d 911 (5th Cir. 1952), *cert. denied* 345 U.S. 925 (1953), cited by the Directors in Pet. Br. at 11, 14, 16.

in *Girard v. 94th Street & Fifth Avenue Corp.*, 530 F.2d 66, 70 (2d Cir. 1976), *cert. denied* 425 U.S. 974 (1976), and in *Cole v. University of Hartford*, 390 F.Supp. at 891, the reasoning of which has been commended to this court by the Directors (Pet. Br. at 23). Its reasoning, however, as well as the reasoning in *Nelson*, should be limited only to the antitrust field, if not rejected entirely.

The concept of "business entity" discrimination created by Judge Stevens seems to Novotny to be irrelevant to 42 U.S.C. §1985(3), which speaks in terms of "persons."

The purpose of the antitrust laws is to promote competition *among* business entities. Where competition *may* be restrained within the corporate structure, as with affiliated or vertically integrated corporations, such structure will not immunize the corporation from the antitrust laws. *Cf. United States v. Yellow Cab Co.*, 322 U.S. 218 (1947), where this Court warned, "the affiliation [of corporations] is assertedly one of the means of effectuating the illegal conspiracy not to compete." 322 U.S. at 229. The Third Circuit has also noted that "common ownership or control of corporations does not insulate them from the antitrust laws," citing exceptions to the general rules. *Johnston v. Baker*, 445 F.2d 424, 427 (3d Cir. 1971). The purpose of §1985(3) is to prohibit invidious conspiracies among individuals directed toward deprivation of constitutionally-protected rights. It is at the very first level of analysis (the legislative purpose) that the antitrust-civil rights analogy breaks down. For antitrust violations, the corporation may be considered an individual which has conspired with another corporation. For civil rights purposes, each individual member of the corporation is capable of violating §1985(3) with any other individual or individuals.

The *Dombrowski* decision specifically noted that its holding would not extend to all corporate activity. 459 F.2d at 193. It warned that members of the Klan could not success-

fully defend acts of violence on the basis that they were merely agents of the Grand Dragon. But, can those very same members, sitting on corporate boards of banks or real estate agencies, intentionally effect policies of employment discrimination or discrimination in housing by performing their functions as acts of collective business judgment?

The case cited by Judge Stevens in *Dombrowski—Morrison v. California*, 291 U.S. 82 (1934)—involved the charging of two individuals for conspiracy to violate the California Alien Land Law. At 291 U.S. at 92, the Supreme Court discussed the nature of conspiracy and the fact that it is impossible in the nature of things for a man to conspire with himself. But the decision in *Morrison* is explainable on factual grounds. The *Morrison* Court is talking about natural persons in a criminal indictment. The defendent Doi could not be guilty of conspiracy because there was no proof that Morrison knew Doi was not a citizen. 291 U.S. at 93. In other words, as a matter of factual proof, Morrison could not be connected to the alleged crimes. That left only Doi, who could not conspire with himself.

The reasoning of Judge Meskill, following *Dombrowski* in *Girard v. 94th Street & Fifth Avenue Corp.*, 530 F.2d 66, seems equally alien to civil rights law:

> Here there is but one single business entity with a managerial policy implemented by the one governing board, while at the University of Pennsylvania,[in *Rackin*], each department had its own disparate responsibilities and functions so that the actions complained of by the plaintiff were clearly not actions of only one policy making body but of several bodies; thus the court correctly held that the allegations supported a claim of conspiracy among them. Here plaintiff's allegations of multiple acts by the directors are not alleged to be other than the implementation of a single policy by a single policy making body.

Id. at 71.

Novotny asserts, however, that the very nature of a conspiracy *requires* a "single policy" upon which the conspirators agree. Otherwise, it would not be a conspiracy. *Kotteakos v. United States*, 328 U.S. 750 (1946); *United States v. Butler*, 494 F.2d 1246 (10th Cir. 1974); *United States v. Kates*, 508 F.2d 308 (3d Cir. 1975). The fact, therefore, that a "single policy" is arrived at is no reason to deny the existence of a conspiracy. Why the corporate entity can be broken down to "departments" and not to individuals is not explained.

Judge Meskill's addition of the "one policy making body" concept to the "single business entity" concept, and his attempted distinction of *Rackin*, 386 F.Supp. 992, are totally unsupported within the law of conspiracy. His assertion that the individual defendants comprise the board of directors through which the corporation acted and that the consent of the board was required before a transfer of ownership interest could be made (530 F.2d at 71) is perfectly consistent with conspiracy theory.

Novotny maintains that antitrust principles of conspiracy are unique to that field and exist because of the limited business purposes of the antitrust statutes, and that those principles should not be engrafted onto general conspiracy law in fields not specifically related to business enterprise.

The particular aim of the antitrust conspiracy prohibition is set forth in cases such as *Nelson Radio and Supply Co. v. Motorola, Inc.*, 200 F.2d 911, in which Circuit Judge Borah noted, *inter alia*:

> Surely discussions among those engaged in the management, direction and control of a corporation concerning the price at which the corporation will sell its goods, the quantity it will produce, the type of customers or market to be served or the quality of goods to be produced do not result in the corporation being

> engaged in a conspiracy in unlawful restraint of trade under the Sherman Act....
>
> The Act does not purport to cover a conspiracy which consists merely in the fact that the officers of the single defendant corporation did their day to day jobs in formulating and carrying out its managerial policy. The defendant is a corporate person and as such it can act only through its officers and representatives. It has the right as a single manufacturer to select its customers and to refuse to sell its goods to anyone for any or no reason whatsoever. It does not violate the Act when it exercises its rights through its officers and agents, which is the only medium through which it can possibly act.

Id. at 914.

In other words, the officers and directors cannot be guilty of conspiring to do that which the corporation "as a *single* manufacturer" had the right to do in the conduct of its business. The analysis derives not from ascertaining the nature of a conspiracy, but solely from the business purpose of the acts performed and decision made. The officers and directors are not guilty of conspiracy not because they didn't "conspire", but because what they conspired to do was not illegal. An invidious discrimination under Title VII of the Civil Rights Act, however, by definition has no business purpose, is illegal, and can be accomplished within a single business entity.

As stated in *United States v. Colgate & Co.*, 250 U.S. 300, 307 (1919), "The purpose of the Sherman Act is...to preserve the right of freedom of trade", and as the Fifth Circuit has recognized, "It is fundamental that at least two independent *business entities* are required for violation of Section 1, while one alone is sufficient under Section 2." *Six Twenty-Nine Productions, Inc. v. Rollins Telecasting, Inc.*, 365 F.2d 478, 484 (5th Cir. 1966) (emphasis added.)

Even where several corporations have been involved in antitrust activity, the Supreme Court has looked to the *economic significance* of the combination, recognizing that an antitrust violation requires a combination or conspiracy in *restraint of trade*, not just any combination or conspiracy. *Sunkist Growers, Inc. v. Winckler & Smith Citrus Products Co.*, 370 U.S. 19 (1962); *United States v. Yellow Cab Co.*, 322 U.S. 218.

Antitrust conspiracy principles, therefore, should not be permitted to operate as one exception to normal conspiracy principles in the civil rights field.[7] Natural persons *can* conspire, whether as corporate officers of a single business

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[7] *Cf.* Stengel, *Intra-Enterprise Conspiracy Under Section 1 of the Sherman Act*, 35 Miss. L.J. 5 (1963); Comment, *Developments in the Law—Criminal Conspiracy*, 72 Harv. L. Rev. at 1000; and Note, *Intracorporate Conspiracies Under 42 U.S.C. §1985(c)*, 92 Harv. L. Rev. 470, 479-80 (1978).

For citations to decisions prior to *Nelson* in which corporate officers were held liable in civil and criminal situations for antitrust violations:

Patterson v. United States, 222 F.599 (6th Cir. 1915) *cert. denied* 238 U.S. 635 (1915); *White Bear Theatre Corp. v. State Theatre Corp.*, 129 F.2d 600 (8th Cir. 1942); *Egan v. United States*, 137 F.2d 369 (8th Cir. 1943), *cert. denied*, 320 U.S. 788 (1943); *Schoedler v. Motometer Gauge & Equip. Corp.*, 134 Ohio St. 78, 15 N.E.2d 958 (1938);

Cf. also, *Mininsohn v. United States*, 101 F.2d 477 (3d. Cir. 1939), cited by the Third Circuit in its opinion in *Novotny* (Pet. App. A at 53a; 584 F.2d at 1258); *Schine Chain Theatres, Inc. v. United States*, 334 U.S. 110 (1948); and *United States v. Yellow Cab Co.*, 322 U.S. 218 (1947), in which the Supreme Court stated:

> The test of illegality under the Act is the presence or absence of an unreasonable restraint on interstate commerce. Such a restraint may result as readily from a conspiracy among those who are affiliated or integrated under common ownership as from a conspiracy among those who are otherwise independent. Similarly, any affiliation or integration flowing from an illegal conspiracy cannot insulate the conspirators from the sanctions which Congress has imposed. The corporate interrelationships of the conspirators, in other words, are not determinative of the applicability of the Sherman Act. That statute is aimed at substance rather than form.

332 U.S. at 227.

entity or not, and there is no reason why their corporate or business positions should insulate them when their conspiracies result in deprivations of civil rights.

This is so because an antitrust conspiracy arguably involves motivations related to corporate business and competition not typically tinged with personal prejudice or malice. Discrimination on the basis of sex cannot, however, by definition, have a competitive purpose and is tinged with personal prejudice and malice. It is, in fact, competitively detrimental because its tendency is to reduce the number of employees employed by the corporation because of their talent. By definition, discrimination on the basis of sex, therefore, can have no legitimate business purpose.

Accordingly, Novotny urges this Court to adopt the reasoning of the Third Circuit and not that of *Dombrowski*.

III. A CONSPIRACY TO VIOLATE RIGHTS GRANTED BY TITLE VII IS ACTIONABLE UNDER 1985(3).

A. 1985(3) Applies To Conspiracies To Deprive Persons Of Rights Created By Federal Statute.

In analyzing the relationship between §1985(3) and Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e, the Third Circuit began, again where it should, with the language and history of the statute in question, and specifically with the words "equal protection of the laws" and "equal privileges and immunities under the laws."

The question was, of course, of which laws may we not be deprived equal protection? The Directors argue, beginning at page 25 of their brief, that in §1985(3) Congress intended to protect only those "fundamental rights of citizens" which had just recently been accorded black persons

under the thirteenth, fourteenth and fifteenth amendments.[8] Novotny argues that the Third Circuit was correct in reading congressional purpose in a significantly broader context, and suggests as well that the law as expressed by this Court dictates the Third Circuit's support.

To the Third Circuit's interpretation of §1985(3) based upon its wording and legislative history (*Cf.* Pet. App. A at 27a, n. 52; 584 F.2d at 1247 n. 52), the Directors have asserted no specific response. Novotny, accordingly, can only suggest that the Circuit Court's reading of the various statements by the senators and representatives is a fair one and leads naturally to the conclusion that Congress intended to protect citizens from conspiracies based on invidiously discriminatory animus to deprive them of rights accorded them under *any* of the laws which Congress had the constitutional authority to promulgate.

The Directors' primary foray into the legislative history of §1985(3) concerns the amendment to Section 2 of the 1871 Act, which amendment, *inter alia*, deleted a list of state police power crimes and added a civil remedy. This amendment, the Directors assert, makes it "clear" that the statute's purpose was to provide a "federal forum for the vindication of violations of fundamental rights of citizens . . ." (Pet. Br. at 29).

Why such an amendment leads the Directors to conclude that Congress had no intent to provide remedies for violations of federal statutory rights and privileges, they do not indicate. In support of their proposition, however, the Directors cite *District of Columbia v. Carter*, 409 U.S. 418 (1973), which, Novotny contends, is inapplicable to the

[8]Novotny does not argue that the securing of fundamental rights of citizenship was not a purpose of Congress, but suggests on the contrary that the securing of such righs to *all* persons was a purpose of Congress which it could accomplish through its authority under the thirteenth amendment. See Novotny's argument beginning on page 52 *infra*.

instant issue before the Court. As *Carter* points out, the provision of federal jurisdiction was a function of Section 1 of the 1871 Act (now 42 U.S.C. §1983) which was concerned solely with deprivations by state officials. At the time the Act of 1871 was passed, this Court notes in *Carter*, there was no federal-question jurisdiction in the federal trial courts and the power to vindicate constitutional or federal rights was vested in the state courts. Section 1 of the Act was Congress' effort to remedy that misplaced reliance upon state officials:

> Although there are threads of many thoughts running through the debates on the 1871 Act, it seems clear that §1 of the Act, with which we are here concerned, was designed primarily in response to the unwillingness or inability of the state governments to enforce their own laws against those violating the civil rights of others.

409 U.S. at 426, citing similar language in *Monroe v. Pape*, 365 U.S. 167 (1961).

Since §1985(3), however, deals with private conspiracies and since in a long line of cases beginning with the *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36 (1873), this Court has held fast to the proposition that Congress has no authority to legislate against private conspiracies to deprive persons of rights and privileges running between them and the states (*United States v. Cruikshank*, 92 U.S. 542 (1876); *United States v. Harris*, 106 U.S. 629 (1883); *Civil Rights Cases*, 109 U.S. 3 (1883)), §1985(3) must apply to the relationships between individuals and the national government. 83 U.S. (16 Wall.) at 78-79.

The holding of the Court in the *Slaughter-House Cases*, did not include a definitive explanation of what those rights are, although it suggested a few possibilities, including the rights of travel to the nation's capital, protection on the high seas, of peaceable assembly and to petition the government for redress of grievances. 83 U.S. (16 Wall.) at 79-80.

The cornerstone of the Directors' argument in this regard is that a federal statutory right is *not* a right which is entitled to protection under §1985(3). The Third Circuit said that it *is* (Pet. App. A at 28a, n.56; 584 F.2d at 1248 n.56), and relied in part on the ninety-five year old case of *United States v. Waddell*, 112 U.S. 76 (1884). *Waddell*, a criminal action involving Revised Statute §5508 (now 18 U.S.C. §241), concerned a conspiracy to interfere with rights of the victim under a federal statute, the Homestead Act (Rev. Stat. §§2289-2291, 18 Stat. 422 (1895)). Novotny suggests that the treatment of *Waddell* by the circuit court in a footnote to its opinion (Pet. App. A at 28a, n.56; 584 F.2d at 1248 n.56) belies the importance of the case in this context. [9] *Waddell* contains the following language:

> The protection of this section [Rev. Stat. §5508 (1875)] extends to no other right, to no right or privilege dependent on a law or laws of the State. Its object is to guarantee safety and protection to persons in the exercise of rights dependent on the laws of the United States, including, of course, the Constitution and treaties *as well as statutes*, and it does not, in this section at least, design to protect any other rights. (Emphasis added).
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> The right assailed, obstructed, and its exercise prevented or intended to be prevented, as set out in this petition, is very clearly a right wholly dependent upon the act of congress concerning the settlement and sale of the public lands of the United States. No such right exists or can exist outside of an act of Congress.

112 U.S. at 79.

The constitutional power of Congress to pass the Homestead Acts in the first instance derived from Article 4,

[9] *See* Note, *The Reach of 42 U.S.C. §1985(3): Sex Discrimination as a Gauge*, 25 Clev. St. L. Rev. 331 (1976).

§3, clause 2, regarding the regulation of the territories, and it is patently clear that the Court in *Waddell* was dealing with a statutorily-created right ("No such right exists or can exist outside of an Act of Congress" 112 U.S. at 79) and *not* one of the "fundamental rights of citizens" alluded to by the Directors.

While the Directors suggest, beginning at page 30 of their brief, that the "independent illegality" theory expressed in *McLellan v. Mississippi Power & Light Co.*, 545 F.2d 919 (5th Cir. 1977) (*en banc*), is unsound, it is clear that the Third Circuit specifically avoided adopting that analysis (Pet. App. A at 29a, n. 55; 584 F.2d at 1247 n.55). The Circuit indicated only that there was sufficient connotation of laws *outside* §1985(3) to warrant the conclusion, when the words of the statute were measured against the words of the congressmen, that §1985(3) protected against the conspiratorial interference with a statutorily created right to equal employment opportunity. Based on all of the foregoing in this regard, the Third Circuit's determination must be supported.

B. Title VII Was Not Intended To Replace Or Supplant Any Other Federal Law Which Might Exist To Remedy Employment Discrimination.

In addition to what Novotny has contended is a weak legislative history attack on the Third Circuit's reasoning in regard to conspiracies to interfere with statutory rights, the Directors' main thrust suggests that the Circuit's interpretation ignores the alleged issues regarding the fact that the federal statute creating the right may have its own independent federal jurisdictional base (Pet. Br. at 31).

In general, Novotny suggests, the objections of the Directors to the Third Circuit ruling on this issue have already been determined against them by prior decision of this Court.

The Third Circuit, far from "ignoring" the issue, dealt with it in its opinion (Pet. App. A at 36a; 584 F.2d at 1251). The primary thrust of the Third Circuit opinion is that there is no conflict between §1985(3) and Title VII and that Congress specifically determined *not* to make Title VII the exclusive federal remedy for employment discrimination, rejecting statutory amendments which would have done exactly that.

The argument of the Directors would seem to have been foreclosed by this Court's opinions in *Alexander v. Gardner-Denver Co.*, 415 U.S. 36 (1974), and *Johnson v. Railway Express Agency*, 421 U.S. 454 (1975).

In *Alexander*, the Court dealt generally with the question of whether an individual could pursue a Title VII remedy after having submitted a race discrimination case to binding grievance and arbitration procedures contained in a collective bargaining agreement. After noting that judicial power to entertain a Title VII claim was simply a question of jurisdiction for which the requirements had been met, the Court noted that "[i]n addition, legislative enactments in this area have long evinced a general intent to accord parallel or overlapping remedies against discrimination". 415 U.S. at 47.

In *Alexander* (415 U.S. at 47 n. 7), the Court references as examples of overlapping or parallel remedies both 42 U.S.C. §1981, from the Civil Rights Act of 1866, and 42 U.S.C. §1983, formerly Section 1 of the Civil Rights Act of 1871. Of course, the Third Circuit referenced as well that portion of the *Alexander* opinion (415 U.S. at 49 n. 9), which speaks for itself regarding congressional intent to repeal directly or by implication any "existing rights granted under other laws".

In *Johnson*, this Court dealt directly with the question of the relationship between Title VII and one of the civil rights

acts—§1981. The Court specifically held that "the remedies available under Title VII and under §1981, although related, and although directed to most of the same ends, are separate, distinct and independent". 421 U.S. at 461.

In so concluding, the Court made reference to congressional indications that 1981 was to survive as an augment to Title VII (*Id.* at 459), and recognized that while a suit under 1981 might interfere with the administrative process of Title VII, such was the natural effect of "the choice Congress has made available to the claimant by its conferring upon him independent administrative and judicial remedies." (*Id.* at 461).

To the extent that the Directors may be understood to suggest that Title VII is the exclusive remedy for private discrimination in employment, therefore, they appear to be in error.

Where Congress has not indicated an intent to make Title VII the exclusive remedy, this Court has not been persuaded by the argument that the non-Title VII remedy might be more attractive to a litigant.[10] The Court recognized that the choice of remedies is a valuable one: "Under some circumstances, the administrative route may be highly preferred over the litigatory; under others, the reverse may be true." *Johnson v. Railway Express Agency*, 421 U.S. at 461. In other words, Novotny argues that §1985(3) represents the assertion of legitimate federal interests in preventing the conspiratorial deprivation of equality of treatment. Not every violation of Title VII will be a conspiracy (the special dangers of which Congress and this Court have repeatedly

[10]"An individual who establishes a cause of action under §1981 is entitled to both equitable and legal relief, including compensatory and, under certain circumstances, punitive damages. [citations deleted] And a backpay award under §1981 is not restricted to the two years specified for backpay recovery under Title VII." *Johnson v. Railway Express Agency*, 421 U.S. at 460.

recognized); not even every violation involving more than one violator will constitute a conspiracy proscribed in §1985(3).

Even where there *was* an exclusivity provision in Title II of the Civil Rights Act, this Court acknowledged the interest to be served by the enforcement of §1985(3) against conspirators ("outside hoodlums" who interfered with persons equal enjoyment of public accommodations in *United States v. Johnson*, 390 U.S. 563 (1968)), and a similar interest should be recognized in this case.

This Court has cited several items from the legislative history of the Civil Rights Act of 1964 and the 1972 amendments thereto in support of the proposition that Congress did not intend to abrogate prior remedies which might exist for employment discrimination. Novotny suggests that there are others which should also be considered.

With regard to Senator Tower's Amendment to the Civil Rights Act of 1964, there appears even in the legislative debates concerning this amendment no indication that the "exclusivity" was to be applied to prevent individuals from seeking judicial redress under independent federal laws. 110 *Cong. Rec.* 13650-52 (1964), cited in *Alexander v. Gardner-Denver Co.*, 415 U.S. at 48 n. 9. As Senator Tower himself indicated: "All that would be precluded by my amendment would be simultaneous, concurrent requirements placed upon an employer or union by more than one Federal Agency." 110 *Cong. Rec.* 13650 (1964).

He repeated this purpose on more than one occasion during the discussion on the amendment and there was no indication at all that the amendment, even if passed, would have affected the jurisdiction of the federal courts over other civil rights statutes.

Senator Williams, quoted in part by the Third Circuit (Pet. App. A at 39a; 584 F.2d at 1252), himself quoted testim-

ony presented before the committee by a representative of the Department of Justice:

> In sum, although we favor the granting of judicial enforcement authority to the EEOC, we are concerned that at this point in time there be no elimination of any of the remedies which have achieved some success in the effort to end employment discrimination. In the field of civil rights, the Congress has regularly insured that there be a variety of enforcement devices to insure that all available resources are brought to bear on problems of discrimination.
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> The problems is widespread and we suggest that all available resources should be used in the effort to correct it.

118 *Cong. Rec.* 3372 (1972).

Senator Williams noted:

> In my judgment, Mr. President, it could not be put more forcefully and more precisely.
>
> We are dealing with a problem in this country that needs all available resources to wipe from our land the terrible condition in which a human being can be and is discriminated against because of nothing that he had anything to do with—a discrimination that is based on race, color, religion, sex, or national origin. All available resources should be available to that individual... One way to reach it is not to strip from that individual his rights that have been established, going back to the First Civil Rights Law of 1866.

Id.

Moreover, House Report No. 92-238 (cited previously in Novotny's argument 1D, above) noted in part:

> An examination of the statistics with respect to the progress of equal employment opportunities clearly shows that the voluntary approach currently applied has failed to eliminate employment discrimination.
>
> • • •
>
> ...Effective remedies have not resulted from present practice.
>
> • • •
>
> The situation of the working women is no less serious.
>
> • • •
>
> Women are subject to economic deprivation as a class. Their self-fulfillment and development is frustrated because of their sex.
>
> • • •
>
> ...The Equal Employment Opportunity Commission has progressively involved itself in the problems posed by sex discrimination, but its efforts here as in the area of racial discrimination, have been ineffective due directly to its inability to enforce its findings.
>
> In recent years, the courts have done much to create a body of law clearly disapproving of sex discrimination in employment. Despite the efforts of the courts and the Commission, discrimination, against women continues to be widespread, and is regarded by many as either morally or physiologically justifiable.
>
> This Committee believes that women's rights are not judicial divertissements. Discrimination against women is no less serious than other forms of prohibited employment practices and is to be accorded the same degree of social concern given to any type of unlawful discrimination.

2 U.S. Code Cong. & Ad. News, 92d Cong., 2d Sess., 2137, 2139-41 (1972).

Based on these readings, Novotny contends that any suggestion that Congress intended to eliminate *any* remedy which might constitute an added means of enforcing equal employment opportunity is absurd. It is beyond question that Congress neither intended to make Title VII the exclusive remedy for rights created therein, nor intended to abrogate in any manner the various statutory remedies for discrimination.

C. The Directors' Reliance On Doski And Brown Set Forth In Their Brief Is Unjustified.

Novotny contends that the reliance of the Directors on *Doski v. M. Goldseker Co.*, 539 F.2d 1326 (4th Cir. 1976), (Pet. Br. at 35), and *Brown v. General Services Administration*, 425 U.S. 820 (1976), (Pet. Br. at 37), is misplaced.

With regard to the §1985(3) claim in *Doski*, Novotny contends that even if the Fourth Circuit was correct in its assumption that Title VII rights and §1985(3) rights were created simultaneousiy by the enactment of Title VII, the failure to accord the §1985(3) remedy is to ignore the independent anti-conspiracy interest embodied in that statute. (*See* the remarks of Rep. Shellabarger regarding the "gist of the offense in the second section," in *Cong. Globe*, 42d Cong., 1st Sess. at H. App. 113-14; the remarks of Rep. Ellis H. Roberts at *Cong. Globe, supra*, at 412 (April 1, 3, 1871); and the remarks of Senator Morton, *Cong. Globe, supra*, at S. App. 252, regarding "confederated action") Not only was the statute a remedy for deprivation of equal privileges and immunities, but it had as its specific aim the neutralizing of conspiratorial activity. Moreover, to the extent that Novotny argues below that §1985(3) protects against the denial of equal employment opportunity, either under Title VII or as

the elimination of a badge of slavery through the thirteenth amendment, such equality arises as an independent right, not dependent on the fourteenth amendment. *Doski*, therefore, is inapposite to the issues.

With regard to *Brown*, Novotny notes that the case is easily distinguishable from the instant one. In that portion of the opinion not quoted by the Directors, this Court said the following, commenting on the congressional belief that it was creating in Title VII the only remedy available for federal employees:

> [T]he relevant inquiry is not whether Congress correctly perceived the then state of the law, but rather what its perception of the state of the law was.
>
> This unambiguous congressional perception seems to indicate that the congressional intent in 1972 was to create an exclusive, pre-emptive administrative and judicial scheme for the redress of federal employment discrimination.

425 U.S. at 828-29.

Continuing on to explain why its ruling differed from that in *Johnson v. Railway Express Agency*, 421 U.S. 454, and why *Johnson* did not apply, the Court said:

> In the first place, there were no problems of sovereign immunity in the context of the *Johnson* case. Second, the holding in *Johnson* rested upon the explicit legislative history of the 1964 Act which "manifests a congressional intent to allow an individual to pursue independently his rights under both Title VII and other applicable state and federal statutes. . . ."

425 U.S. at 833.

In other words, in one instance, Congress simply intended the remedy to be exclusive and in the other, it did not. Novotny believes that the Directors' references to

United States v. DeLaurentis, 491 F.2d 208 (2d Cir. 1974), (Pet. Br. at 33), *International Brotherhood of Teamsters v. Daniel*, 47 U.S.L.W. 4135 (January 16, 1979), (Pet. Br. at 38), and *Platt v. Burroughs Corp.*, 424 F.Supp. 1329 (E.D. Pa. 1976), (Pet. Br. at 33), may be analyzed based on congressional intent in the same fashion.

Accordingly, since Congress did not express an intent to make Title VII an exclusive remedy for sex discrimination, a §1985(3) claim may be pursued.

IV. THERE ARE AT LEAST TWO SOURCES OF CONGRESSIONAL POWER TO SUPPORT A §1985(3) PROHIBITION AGAINST SEX DISCRIMINATION IN EMPLOYMENT.

A. The Commerce Clause Forms A Basis Of Constitutional Authority For The Application Of §1985(3) To This Case.

The Directors maintain, beginning at page 40 of their brief, that the commerce clause cannot provide a source of constitutional power for the enactment of §1985(3).

They contend, initially, that the commerce clause was not intended to be the source of such power.

This Court, in *Griffin*, never indicated that the identification of a source of congressional power depended on a specific expression of intent. *See Woods, Housing Expediter v. Cloyd W. Miller Co.*, 333 U.S. 138, 144 (1948) and *Ex Parte Yarbrough*, 110 U.S. 651 (1884). Actually, however, expressions of legislative intent that are found in the history suggest that Congress called upon *whatever* power it possessed to accomplish the goals of the Act.

Representative Monroe, recorded in the *Cong. Globe*, 42d Cong., 1st Sess., at H. 370, (March 31, 1871), said as follows:

> In interpreting the constitution of any great, free country there is a fair presumption that it contains sufficient grants of power to the legislative body to secure the great primal objects for which constitutions and governments exist.

Representative Shellabarger noted (*Cong. Globe*, 42d Cong., 1st Sess., at App. 69 (March 28, 1871) that:

> Congress is charged with the duty of "enforcing by legislation every constitutional provision. This grows out of the position and nature of such a Government as ours, and is as imperative in the cases not enumerated specially in respect to such legislation as in others." In shorter words, Congress is bound to execute, by legislation, every provision of the Constitution, even those provisions not specially named as to be so enforced.

The right to travel, which this Court in *Griffin* found to be an appropriate source of congressional power to reach a §1985(3) conspiracy, had been held by this Court to be grounded in the commerce clause both prior to the passage of the Civil Rights Act of 1871 and subsequently thereto. Sixty-five years before ratification of the fourteenth amendment, Justice Washington in *Corfield v. Coryell*, 6 F. Cas. 546, 552 (E.D.Pa. 1823), recognized the right to travel as grounded on the privileges and immunities clause of the Constitution, Art. IV, §2. Not long thereafter, this Court in the *Passenger Cases*, 48 U.S. (7 How.) 283 (1849), analyzed the right in terms of the commerce clause. In dissent (on other grounds), Justice Taney recognized the right as one of national citizenship. 48 U.S. (7 How.) at 492. The Taney approach was followed by the Court in *Crandall v. Nevada*, 73 U.S. (6 Wall.) 35, 44 (1868), although Justices Clifford and Chase in concurrence rested on commerce clause grounds. In *Edwards v. California*, 314 U.S. 160, 172 (1941), the Court squarely based the right on the commerce clause, with Justices Douglas and Jackson in concurrence but preferring to

define the right as one of national citizenship protected by the privileges and immunities clause of the fourteenth amendment.[11] *Id.* at 178, 183. In *Edwards*, the majority decision "was consistent with precedents firmly establishing that the federal commerce power surely encompasses the movement in interstate commerce of persons as well as commodities." *United States v. Guest*, 383 U.S. 745, 758-59 (1966).

Infringement of the right to travel has been held to be punishable by federal conspiracy statutes for nearly three quarters of a century. In *United States v. Moore*, 129 F. 630, 633 (N.D. Ala. 1904), the right was explicitly recognized as protectible under what is now 18 U.S.C. §241, a statute this Court in *Griffin* characterized as the closest remaining criminal analogue to §1985(3) 403 U.S. at 98. This dictum in *Moore* was elevated to a holding in *Guest*, 383 U.S. at 759, based on the relationship to the commerce clause.

In addition to the right to travel, rights created by Title II, the public accommodations provision of the Civil Rights Act of 1964, 42 U.S.C. §2000a, have been held by this Court to be protectible under 18 U.S.C. §241. *United States v. Johnson*, 390 U.S. 563, 565 (1968). Title II was explicitly upheld by this Court as a constitutional exercise of Congress' commerce powers. *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241 (1964); *Katzenbach v. McClung*, 379 U.S. 294 (1964).[12]

[11] In *Heart of Atlanta Motel, Inc. v. United States, supra* at 279 (1964), Justice Douglas noted that his reluctance to rest solely on the commerce clause in both that case and in *Edwards* was "not due to any conviction that Congress lacks power to regulate commerce in the interests of human rights."

[12] In *Steele v. Louisville & Nashville Railroad Co.*, 323 U.S. 192, 203 (1944), this Court held that the Railway Labor Act, 45 U.S.C. §151 *et seq.*, passed pursuant to Congress' commerce clause powers, imposed a duty on a labor organization acting under the statute as the exclusive bargaining representative to represent all employees without discrimination because

(continued)

Thus, it is clear that according to this Court's precedents, federal rights recognized as deriving from the commerce clause can give rise to a cause of action under the federal conspiracy statutes.

Since they appear to recognize that what Congress had the power to do under Title VII, it might have power to do under §1985(3), the Directors attempt to demonstrate the alleged lack of constitutional authority for §1985(3) by engrafting onto the constitutional power a condition that Congress must incorporate into the statute's framework the "elements of proof" concerning its affect on commerce. Such a condition is not a requirement, Novotny suggests, and while the Court in *Katzenbach v. McClung, supra*, made "mention" of testimony at hearings before Congress prior to the passage of the legislation, it determined that no formal findings were necessary to make the act valid and that no provision was necessary for an independent inquiry regarding the effect on commerce of the prohibited activity.

The Directors lean on the proposition that §1985(3) is a remedial statute and creates no substantive rights of its own. If such is the case its constitutional source is the same as the source of Congress' power to create the right which is in question. If the right is created pursuant to the commerce clause, as the Directors concede, and the creation of the right is itself constitutional (a proposition not challenged by the Directors in regard to Title VII), then Congress has the power to protect that right.

In construing §1985(3), this Court in *Griffin v. Breckenridge*, 403 U.S. 88, looked to the constitutional source of the

of race. This duty implied a correlative federal right secured by the statute. *Id.* at 204. Having implied a statutory right, this Court then fashioned a remedy for breach of the implied statutory duty. *A fortiori*, this Court can apply an express congressional remedy, §1985(3), for violation of an express statutory right, Title VII created under Congress commerce powers.

substantive right protected in order to determine the source of congressional power to prohibit a conspiracy to violate that right. The analysis relied upon earlier Supreme Court constructions of 18 U.S.C. §241.[13] "It has long been settled," Justice Stewart wrote for the Court, "that 18 U.S.C. §241, a criminal statute of far broader phrasing [than 42 U.S.C. §1985(3)], reaches wholly private conspiracies, and is constitutional." 403 U.S. at 104.

The Court first upheld the constitutionality of 18 U.S.C. §241, then Rev. Stat. §5508, in *Ex Parte Yarbrough*, 110 U.S. 651. The defendants had been charged under the Act with conspiring to interfere with the right of a black person to vote in a congressional election. They challenged the constitutionality of §5508 on the ground that no express power authorized Congress to protect the right to vote. This Court found the right to vote for a member of Congress inherent in the Constitution, Art. I, §2, which created the congressional position and provided that it should be filled by election. In addition, the fifteenth amendment was found to "substantially confer on the negro the right to vote." 110 U.S. at 665. Laws such as Rev. Stat. §5508, passed by Congress to protect this right, "stand upon the same ground and are to be upheld for the same reason." *Id.* at 662. The congressional power to enact such laws "arises out of the circumstance that the function in which the party is engaged or the right which he is about to exercise is dependent on the laws of the United States." *Id.*

[13] 18 U.S.C. §241:

> If two or more persons conspire to injure, oppress, threaten, or intimidate any citizen in the free exercise or enjoyment of any right or privilege secured to him by the Constitution or laws of the United States, or because of his having so exercised the same; or
>
> If two or more persons go in disguise on the highway, or on the premises of another, with intent to prevent or hinder his free exercise or enjoyment of any right or privilege so secured—
>
> They shall be fined not more than $5,000.00 or imprisoned not more than ten years, or both.

Eight months after *Yarbrough* was decided, this Court was faced with another challenge to the constitutionality of Rev. Stat. §5508 in *United States v. Waddell*, 112 U.S. 76, as cited by the Third Circuit in the instant case. In determining the proper source of congressional power to protect homesteaders through §5508, the *Waddell* Court looked to the power of Congress to enact the substantive statutory right provided by the Homestead Acts. The source of the power was found to be Art. IV, §3 of the Constitution, which vests in Congress the power to dispose of and make all needful rules and regulations respecting the territory or other property of the United States. In rejecting the argument that the conspiracy statute was unconstitutional, the Court looked to the constitutional base of the substantive right, stating:

> Whenever the acts complained of are of a character to prevent the exercise of a statutory right or throw obstruction in the way of exercising this right, and for the purpose and with intent to prevent it or to injure or oppress a person because he has exercised it, then, *because it is a right asserted under the law of the United States and granted by that law, those acts come within the purview of the statute and of the constitutional power of Congress to make such a statute.*

112 U.S. at 80 (emphasis added).

An analysis similar to *Waddell* took place in *Logan v. United States*, 144 U.S. 263 (1892), where the congressional power to prohibit a conspiracy to injure persons who were in the custody of a federal marshal was found to rest in the power to prohibit crimes against the United States. In that decision, the Court reviewed the prior decisions dealing with the constitutionality of Rev. Stat. §5508, and reaffirmed the established principle that:

> [E]very right created by, arising under, or dependent upon the Constitution of the United States may be

> protected by such means and in such manner as Congress, in the exercise of . . . the legislative powers conferred upon it by the Constitution may in its discretion deem most eligible and best adapted to attain the object.

144 U.S. at 293.

In *Griffin*, this Court identified two sources from which rights protected by §1985(3) might derive—the thirteenth amendment and national citizenship itself (403 U.S. at 105-06). Since the Court recognized that what Congress had done by §1985(3) was to create a "statutory cause of action" (*Id.* at 105), the question of constitutional power relates to the right the violation of which gives rise to the cause of action. (Whether §1985(3) has an independent commerce base is not before this Court.) Novotny suggests that there can be no serious doubt that if Congress had the power under the commerce clause to create a right to equal employment opportunity, it also had the power to create a cause of action, either in the same or in another enactment, for a conspiratorial discriminatory interference with such a right.

The analysis suggested by *Yarbrough*, *Waddell* and *Logan* was the same analysis followed by this Court in *Griffin*. In each case the Court first determined the constitutional source of the right interfered with and applied the anti-conspiracy remedy to it. The Third Circuit, appropriately, did the same thing.

B. The Inability To Sell One's Labor Free From Invidious Discrimination Is A Badge Or Incident Of Slavery Which Congress Had The Obligation To Abolish For All Persons Under The Thirteenth Amendment.

The Directors have suggested that although the thirteenth amendment, by its own terms, prohibits the imposition of slavery on any person, Congress is somehow limited to the eradication of slavery as it was practiced at the time the amendment was approved, to-wit, slavery on the basis of race and color (Pet. Br. at 44). Of course, slavery at that time was practiced on the basis of race and color *only* against black persons, so the logical extension of the Directors' argument is that Congress has the power to eradicate slavery only if blacks are slaves or marked with the badges of slavery. If this were true, then *McDonald v. Santa Fe Trail Transportation Co.*, 427 U.S. 273 (1976) cannot have been decided properly. Moreover, the Directors give no clue as to their conclusion that the grant of power in the thirteenth amendment was *limited* to slavery based upon race.

It may be, without conceding such, that §1981 was concerned only with *racial* discrimination in contract rights (*Cf. McDonald v. Santa Fe Trail Transportation Co., supra* at 287), but the Directors' suggestion that Congress has the power to deal *only* with slavery based on race surely must be erroneous. "Undoubtedly while negro slavery alone was in the mind of the Congress which proposed the thirteenth article, it forbids any other kind of slavery, now or hereafter." *Slaughter-House Cases*, 83 U.S. (16 Wall.) at 72; *see also Civil Rights Cases*, 109 U.S. at 20, cited by this Court in *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 438-39 (1968).

Further, the Directors' analysis of *Jones* ("the thirteenth amendment, as interpreted in *Jones*, only authorizes remedial legislation which prohibits discrimination on the basis of race or color" (Pet. Br. at 44)) is equally incorrect since there is nothing in *Jones* which is so limiting. The *Jones* Court had only one constitutional question to decide: "Does the authority of Congress to enforce the Thirteenth Amendment 'by appropriate legislation' *include* the power to eliminate all racial barriers to the acquisition of real and personal property?" 392 U.S. at 439 (emphasis added).

In answer to the question, the Court said:

> "By its own unaided force and effect," the Thirteenth Amendment "abolished slavery, and established universal freedom." *Civil Rights Cases*, 109 U.S. 3, 20. Whether or not the Amendment *itself* did any more than that—a question not involved in this case—*it is at least clear that the Enabling Clause of that Amendment empowered Congress to do much more.*

Id. (emphasis added)

Any suggestion, therefore, by the Directors that the power of Congress to enact legislation to enforce the thirteenth amendment was limited to the eradication of slavery as it existed at that time is clearly wrong.

In addition, Novotny finds nothing in *Jones* to suggest that the thirteenth amendment (as opposed to §1981 or §1982) was limited to discriminations based on race, and the claim of the Directors (Pet. Br. at 44), based on their reading of *Runyon v. McCrary*, 427 U.S. 160 (1976) and *Jones*, that civil rights statutes looking to the thirteenth amendment must be limited to racially motivated discrimination, is also in error.

In *Runyon*, the Court addressed two basic questions: "whether §1981 prohibits private, commercially operated, non-sectarian schools from denying admission to prospective students because they are Negroes, and, if so, whether that federal law is constitutional as so applied." 427 U.S. at 168.

Accordingly, the Court had no occasion to have to decide the question of the scope of congressional power under the thirteenth amendment outside the area of race, and it did not.

The Directors further cite *United States v. Cruikshank*, 92 U.S. 542 (1876), and indicate that the Court dismissed an

indictment charging interference with rights granted under the Constitution and laws of the United States because of the failure of the indictment to alleged racial prejudice as a motive (Pet. Br. at 45). The suggestion is made by the Directors that only racially motivated private action could be prohibited under the thirteenth amendment.

A thorough reading of *Cruikshank*, however, reveals no such indication by the Court. What the Court did say was:

> No question arises under the *Civil Rights Act of April 9, 1866* (14 Stat. 27), which is intended for the protection of citizens of the United States in the enjoyment of certain rights, without discrimination on account of race, color, or previous condition of servitude, because, as has already been stated, it is nowhere alleged in these counts that the wrong contemplated against the rights of these citizens was on account of their race or color.

92 U.S. at 555 (emphasis added)

All the Court was indicating was that since the Civil Rights Act of 1866 was passed for the protection of black persons, an allegation that the victims were deprived of rights existing by virtue of *that Act* must charge that Defendants were motivated against the victims because they, the victims, were black. Nowhere in *Cruikshank* does it say, or even suggest, that the thirteenth amendment was *limited* to the protection against racially motivated enslavement or servitude.

Novotny contends that the Directors' reliance on *United States v. Harris*, 106 U.S. 629 (1883) (Pet. Br. at 45), is also misplaced. In view of subsequent case law, the restrictive analysis of the thirteenth amendment set out in *Harris*, 106 U.S. at 640-43, cannot be considered controlling. *See Jones v. Alfred H. Mayer Co.*, 392 U.S. 409; *Griffin v. Breckenridge*, 403 U.S. 88; *Sullivan v. Little Hunting Park, Inc.*, 396 U.S. 229 (1969); *Runyon v. McCrary*, 427 U.S. 160; *cf. Clyatt v.*

United States, 197 U.S. 207 (1905) (anti-peonage statute enforced irrespective of the race of the parties.)

In the *Civil Rights Cases*, 109 U.S. 3 (1883), the Court enumerated some, though not all, of the fundamental rights with which Congress sought to deal:

> Congress . . . by the Civil Rights Bill of 1866, passed in view of the Thirteenth Amendment, before the Fourteenth was adopted, undertook to wipe out these burdens and disabilities, the necessary incidents of slavery constituting its substance and visible form; and to secure to all citizens of every race and color, and without regard to previous servitude, those fundamental rights which are the essence of civil freedom, namely, the same right to make and enforce contracts, to sue, be parties, give evidence, and to inherit, purchase, lease, sell and convey property, as is enjoyed by white citizens.

109 U.S. at 22.

The Court did not commit itself to the conclusion that all of those enumerated rights are in fact fundamental, and one commentator has suggested that the Court was simply describing what Congress had attempted to do. *See* Calhoun, *The Thirteenth and Fourteenth Amendments: Constitutional Authority for Federal Legislation against Private Sex Discrimination*, 61 Minn. L. Rev. 313, 351 n. 149 (1977). Nevertheless, this Court has repeatedly held that Congress has the right to determine for itself what are the badges and incidents of slavery and "to translate that determination into effective legislation." *Jones v. Alfred H. Mayer Co.*, 392 U.S. at 440. In *Jones*, the Court specifically overruled *Hodges v. United States*, 203 U.S. 1 (1906), to the extent that that case had held that an interference on racial grounds with the right to dispose of their labor by contract was not a badge or incident of slavery. 392 U.S. at 441-42 n.78.

In *Hodges*, Justice Harlan, who dissented, asserted that: "One who is shut up by superior or overpowering force, constantly present and threatening, from earning his living in a lawful way of his own choosing, is as much in a condition of involuntary servitude as if he were forcibly held in a condition of peonage." 203 U.S. at 34.

In *Jones*, this Court seems to have adopted the broader view of the thirteenth amendment espoused by Harlan's dissent in *Hodges*, and has since made it unquestionable that the thirteenth amendment supports the freeedom to contract without discrimination in private employment as one of the rights of citizenship which spell the difference between freedom and slavery. *Johnson v. Railway Express Agency*, 421 U.S. 454 (1975); *McDonald v. Santa Fe Trail Transportation Co.*, 427 U.S. 273. Moreover, this Court has consistently held that the thirteenth amendment's abolition of slavery applies to *all* citizens. In one portion of *Hodges* not inconsistent with the opinion in *Jones*, the Court indicated that the thirteenth amendment "reaches every race and every individual, and if in any respect it commits one race to the Nation it commits every race and every individual thereof (203 U.S. at 17); and in *Bailey v. Alabama*, 219 U.S. 219, 241 (1911), the Court called the amendment "a charter of universal civil freedom for all persons, of whatever race, color or estate, under the flag."

Both this Court, in *Kahn v. Shevin*, 416 U.S. 351, and *Califano v. Webster*, 430 U.S. 313, and Congress, have recognized the important governmental interest in remedying the debilitating effects of past widespread sex discrimination in the marketplace. Limited as it is to class-based invidious discriminations such as sex, §1985(3) provides an effective and much needed means of furthering that governmental interest.

Clearly, neither women in general nor any one of them, may be deprived of rights which spell the difference between freedom and slavery. Since the ability to contract for private employment is a right which spells the difference between freedom and slavery, and since Congress has the power to legislate for the purpose of preventing a discriminatory interference with that right, Congress has the power under the thirteenth amendment to legislate against private (*Griffin*, 403 U.S. 88) employment discrimination based on sex.

Accordingly, if §1985(3) was legislation to protect against discriminatory interference with those fundamental rights, Congress could find its source for that power in the thirteenth amendment.

CONCLUSION

For the foregoing reasons, Novotny contends that the Directors may be personally liable for their conspiracy to deprive women of equality of rights under federal law, which conspiracy resulted in substantial damage to Novotny, who requests accordingly that the judgment of the United States Court of Appeals for the Third Circuit be affirmed, and that the case be remanded to the District Court for trial on the merits of the complaint.

Respectfully submitted,

Stanley M. Stein, Esquire

FOR ARGUMENT

IN THE

Supreme Court of the United States

October Term, 1978

No. 78-753

GREAT AMERICAN FEDERAL SAVINGS & LOAN ASSOCIATION, JOHN A. VIROSTEK, JOSEPH E. BUGEL, JOHN J. DRAVECKY, DANIEL T. KUBASAK, EDWARD J. LESKO, JAMES E. ORRIS, JOSEPH A. PROKOPOVITSH, JOHN G. MICENKO, and FRANK J. VANEK,

Petitioners,

v.

JOHN R. NOVOTNY,

Respondent.

REPLY BRIEF FOR PETITIONERS

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v.

JOHN R. NOVOTNY,

Respondent.

REPLY BRIEF FOR PETITIONERS

Respondent's position in this appeal is based upon the following four fundamental misconceptions concerning the arguments set forth in the Brief for Petitioners:

1. That corporate officers and directors are shielded from individual liability because they cannot form a civil conspiracy while working on behalf of their corporation;
2. That the elements of a "conspiracy" vary with the nature of the substantive offenses allegedly committed by the conspirators;
3. That 42 U.S.C. §1985(3) confers substantive rights which predate the passage of Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e; and
4. That this Court's requirement that a "congressional source of power" be identified under 42

U.S.C. §1985(3) is limited to identification of the constitutional source of the substantive right being remedied under the statute.

I. The Fact That Officers And Directors Working On Behalf Of Their Corporation Cannot Form A Civil Conspiracy Does Not Immunize Them From Individual Liability.

Respondent (hereinafter referred to as "Novotny") attempts to refute the applicability of the principle that officers and directors working on behalf of their corporation cannot form a civil conspiracy because the principle would shield the officers and directors from individual liability. This is simply not correct.

As noted by Novotny on page 20 of his brief, officers and directors are individually liable for their torts. Furthermore, through the "remedy expanding" principle of *respondeat superior,* the corporation is liable, and a person harmed by a tortious act can seek his remedy from *both* the individuals and the corporation.

As discussed in the Brief for Petitioners, however, the operation of *respondeat superior* in the corporate context negates the need for the application of another remedy expanding principle—civil conspiracy.[1]

In the instant case, for example, Novotny could have sued the individual officers and directors who participated in the decision to terminate him as joint tortfeasors under a tort theory such as wrongful dicharge or

1. In addition, unlike *respondeat superior,* which stems from the understanding that a corporation acts collectively through its agents, the corporate conspiracy rule which Novotny wants this Court to adopt ignores how a corporation operates by treating corporate agents as individuals.

tortious interference with contractual relations. Since the officers and directors were allegedly working on behalf of the corporation at all relevant times, liability could be imputed to the corporation under the theory of *respondeat superior.* The full panoply of defendants was therefore available to Novotny.

Novotny elected, however, to sue the Association and its officers and directors upon the statutory bases of Title VII and Section 1985(3) rather than upon a common law tort basis. The Title VII claim alleges that the termination of Novotny was accomplished in violation of Title VII by "the individual defendants, on behalf of GAF" (App. A at 6. ¶29).[2]

The issue, therefore, is not whether Novotny may sue *both* the individual officers and directors and the Association for the alleged discrimination. He has expressly sued both in the Complaint. The issue is whether, in addition to proceeding under Title VII, Novotny may utilize 42 U.S.C. §1985(3) to impose further liability on the individual officers and directors and the Association.

Imposition of additional liability under Section 1985(3), however, is unnecessary and inequitable. It is unnecessary because the remedy expanding purpose of civil conspiracy liability is already available through *respondeat superior*[3] and, in an employment discrimination case, Title VII. It is inequitable because a corpora-

2. As noted in the Brief for Petitioners at 20 n.14, a Title VII charge can be filed against an employer "and any agents." 42 U.S.C. §2000e(b). Although Novotny named the individual officers and directors as defendants to the Title VII count in the Complaint, he did not name them as Respondents to the EEOC charge.

3. Cases involving allegations of a conspiracy among agents of a municipal corporation are not analo-

tion can only act through its agents, and any corporate decision of note would automatically involve the participation of a number of agents who are allegedly co-conspirators. In addition, fear of further potential liability could "chill" corporate agents from making their day-to-day collective decisions.[4]

Every court of appeals which has held that officers and directors acting on behalf of their corporation cannot form a conspiracy under Section 1985(3) was therefore correct from both a legal and equitable standpoint.[5]

---

gous to the application of conspiracy principles to private corporations. Until recently municipal corporations were not considered "persons" under the Enforcement Act of 1871. *Monroe v. Pape,* 365 U.S. 167 (1961). Unless the individual agents were liable, therefore, no recovery would be possible. Moreover, this Court has rejected application of traditional concepts of vicarious liability to municipal corporations. *Monell v. New York City Dept. of Social Services,* 436 U.S. 658 (1978).

4. The Third Circuit's assertion (Pet App. A at 53a n. 121) that its broad interpretation of a conspiracy in a civil rights context would have little "impact" because corporate employment decisions do not have the potential liability that decisions with antitrust implications have is totally unfounded. The number of Title VII employment discrimination cases filed in the one-year period ending on June 30, 1977 was 5,931 in comparison to 1,689 antitrust cases. 1977 Annual Report of the Director of the Administrative Office of the United States Courts 100, 112. This disparity would be even greater if the administrative and conciliatory functions of Title VII can be negated by the assertion of Title VII rights under Section 1985(3) as advocated by Novotny.

5. Novotny cites several cases, primarily from federal district courts in Pennsylvania, which have attempted to create an exception to the application of conspiracy principles under Section 1985(3). *E.g., Rackin v. University of Pennsylvania,* 386 F. Supp. 992 (E.D. Pa. 1974); *Jackson v. University of Pittsburgh,* 405 F. Supp. 607 (W.D. Pa. 1975); *Dupree v. Hertz Corp.,* 419 F. Supp. 764 (E.D. Pa. 1976); *Beamon v. W. B. Saunders Co.,* 413 F. Supp. 1167 (E.D. Pa. 1976). These cases place undue stress on Mr. Justice Stevens' language in *Dombrowski v. Dowling,* 459 F.2d 190, 196 (7th Cir. 1972), that "a single act of discrimination by a single business entity" cannot constitute a conspiracy for purposes of Section 1985(3). The *Rackin* line of cases reasons that if more than a single act of discrimination is committed, a conspiracy exists. A conspiracy, however, requires two or more persons, not two or more acts in furtherance of the conspiracy. Nothing in Section 1985(3) suggests otherwise. The reasoning of *Rackin* is, therefore, unsound, as recognized in the Brief for Respondent at 31, and should not be considered an exception to the well-founded rule that officers and directors acting on behalf of their corporation cannot form a conspiracy.

II. The Elements Of A Conspiracy Do Not Change With The Substantive Offense Allegedly Committed By The Conspirators.

The primary element of a conspiracy is that it involves two or more "persons." It is a long-established concept of corporate law that a corporation and its agents working on behalf of the corporation are one "person" in the eyes of the law. It is therefore not surprising that when this conspiracy requirement and corporate principle are combined, courts conclude that a conspiracy cannot be formed by a corporation and its agents working on its behalf. *See, e.g., Nelson Radio & Supply Co. v. Motorola, Inc.,* 200 F.2d 911 (5th Cir. 1952), *cert. denied,* 345 U.S. 925 (1953).

Because the first case to apply this reasoning to 42 U.S.C. §1985(3), *Dombrowski v. Dowling,* 459 F.2d 190 (7th Cir. 1972), relied on *Nelson Radio,* an antitrust case, Novotny asserts that the differences in substan-

tive offenses call for different interpretations of the elements of a conspiracy. In other words, there are "antitrust principles of conspiracy" as opposed to "civil rights principles of conspiracy." (Brief for Respondent at 33).

Novotny creates this unfounded dichotomy because the "business entity" harm sought to be prevented by the antitrust laws is "irrelevant to 42 U.S.C. §1985(3), which speaks in terms of 'persons'" (Brief for Respondent at 29). The premise of Novotny's argument, however, is incorrect on several grounds.

First, the Sherman and Clayton Acts do not speak in terms of "business entities," but are addressed to "persons." Section 1 of the Sherman Act, 15 U.S.C. §1 (1976), clearly states that "[e]very *person* who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony . . ." (emphasis added).

It cannot be disputed that a corporation is a "person" for purposes of the Sherman Act. 15 U.S.C. §8 (1976). Nor can it be seriously disputed that a corporation is a "person" for purposes of Section 1985(3). *E.g., Dombrowski, supra; Girard v. 94th Street & Fifth Avenue Corp.*, 530 F.2d 66 (2d Cir. 1976), *cert. denied*, 425 U.S. 974 (1976). *Cf. Monell v. New York City Dept. of Social Services*, 436 U.S. 658 (1978) (a municipal corporation is a "person" for purposes of 42 U.S.C. §1983).[6]

6. In light of these cases, Novotny's assertion that there is "nothing in the statute or the legislative history [of Section 1985(3)] to lead to the conclusion that corporations were 'persons' to be either protected or punished" (Brief for Respondent at 17) is quite puzzling.

Second, since the antitrust laws focus on "persons" rather than "business entities," it is possible for an individual and a *single* business entity to form a conspiracy in violation of the law. *E.g., Johnston v. Baker*, 445 F.2d 424 (3d Cir. 1971) (corporation and officer working for personal gain could form conspiracy). There is, therefore, nothing inherent in the antitrust laws which requires illegal activity by a multiplicity of "business entities."

That Congress directed the antitrust laws against an economic harm more likely to be created by a combination of business entities is irrelevant. That the harm sought to be remedied by the passage of Title VII can be created by a single employer is likewise irrelevant. The question for this Court is whether a single corporate employer can have its potential Title VII liability compounded by a cause of action under Section 1985(3) simply because the corporation necessarily functions through the acts of a number of agents.

Finally, the principle that the agents of a corporation, working on behalf of that corporation, cannot form a conspiracy is not an exclusive antitrust concept. Petitioners have cited numerous examples of the application of this principle in contexts other than antitrust (Brief for Petitioners at 15). *E.g., Dorsey v. Chesapeake and Ohio Railway Co.*, 476 F.2d 243 (4th Cir. 1973) *(per curiam); Worley v. Columbia Gas*, 491 F.2d 256 (6th Cir. 1973), *cert. denied*, 417 U.S. 970 (1974).

There is no support in law or reason for Novotny's assertion that the elements of a conspiracy change depending upon the substantive offense and that a rule applied to an antitrust conspiracy should not be applied in a civil rights context.

III. Section 1985(3) Does Not Provide Any Substantive Right Which Predates The Passage Of Title VII.

Novotny contends that Title VII rights are enforceable under 42 U.S.C. §1985(3) because Title VII was not intended to be the exclusive federal remedy for employment discrimination (Brief for Respondent at 39).

The fallacy of Novotny's contention rests on his failure to analyze the differences between 42 U.S.C. §§1981 and 1985(3). Section 1981 creates *substantive* rights which predate the passage of Title VII. Since Congress did not intend to supplant such rights with Title VII, this Court has held that Title VII is not the exclusive federal remedy for employment discrimination which falls within the scope of both statutes. *Johnson v. Railway Express Agency,* 421 U.S. 454 (1975).

Section 1985(3), in contrast, is purely a *remedial* statute. It must look elsewhere for the right to be enforced, and the *only* source for the right invoked in this case—the right to be free from sex discrimination in private employment—is Title VII itself.

When Congress created Title VII rights, however, it also created an exclusive administrative/judicial framework which must be utilized to enforce those rights.[7] *Alexander v. Gardner-Denver Co.,* 415 U.S. 36, 44 (1974). Since Novotny is not being deprived of any pre-existing right, this situation falls within the ambit of *Brown v. General Services Administration,* 425 U.S. 820 (1976), and not *Johnson v. Railway Express, supra.*[8]

Novotny's assertion that Congress intended to create exclusive jurisdiction for rights conferred by Section 717 of Title VII,[9] as well as the Labor-Management Relations Act,[10] the Employee Retirement Income Security Act,[11] and the Age Discrimination in Employment Act,[12] but not for the Title VII sex discrimination and retaliation rights is unsupported (Brief for Respondent at 45-46).

Section 1985(3), therefore, cannot and should not be used to bypass and subvert the Title VII enforcement scheme so carefully created by Congress. *Doski v. M. Goldseker Co.,* 539 F.2d 1326 (4th Cir. 1976).[13]

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7. Novotny, at 37 and 41 of his brief, relies upon two criminal cases, *United States v. Waddell,* 112 U.S. 76 (1884), and *United States v. Johnson,* 390 U.S. 563 (1968). Both cases, however, deal with rights *not otherwise assertible* criminally without 18 U.S.C. §241. In contrast Title VII rights can and must be asserted under Title VII only. To permit Novotny to proceed under 1985(3) with a Title VII-based right not only would wreak havoc with the exclusivity inherent in Title VII, but would not fulfill the congressional/remedial purpose of 1985(3)——to create a forum to vindicate civil rights *not otherwise assertible.*

8. In their *amici* brief the United States and Equal Employment Opportunity Commission ("EEOC") concede that Congress may create an exclusive enforcement mechanism for "new rights." (U.S. Brief at 26). The creation of Title VII rights was such an instance. Novotny is in the anomalous position of arguing that the creation of Title VII rights constructively supplanted the Title VII enforcement mechanism because such rights can be enforced under Section 1985(3).

9. 42 U.S.C. §2000e-16 (1976).

10. 29 U.S.C. §158 (1976).

11. 29 U.S.C. §1001 (1976).

12. 29 U.S.C. §621 (1976).

13. The United States and EEOC *amici* brief at 27-28 also contends that there are no "practical" prob-

IV. Section 1985(3) Is Not A Remedy For All Wrongs Which Are Within The Constitutional Power of Congress To Regulate.

In *Griffin v. Breckenridge,* 403 U.S. 88, 104 (1971), this Court required that a "source of congressional power to reach the private conspiracy alleged by the complaint" must be identified in each case. Novotny contends that this analysis is satisfied if a constitutional source of power is identified for the right allegedly violated by the conspiracy.

According to Novotny, the analysis in this case is, therefore, quite simple. A Title VII right was allegedly violated. Congress had the power to confer such rights under the commerce clause. This right can, therefore, be enforced under Section 1985(3) in light of congressional power under the commerce clause.

As discussed in detail in the Brief for Petitioners at 41-43, however, there are limitations on the congres-

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lems in allowing enforcement of Title VII rights under Section 1985(3) despite the fact that plaintiffs can avoid the administrative Title VII procedure. This surprising conclusion is based on the assertion that the burden of proof under Section 1985(3) is more rigorous because a plaintiff must prove the existence of a conspiracy, a class-based animus, and intent to deprive a Title VII right.

On the contrary, virtually every corporate employment decision will involve participation of at least two agents, thereby creating a "conspiracy;" violations of Title VII are inherently class-based; and "intent to deprive" someone of a Title VII right is not an element of a Section 1985(3) cause of action. *Griffin v. Breckenridge,* 403 U.S. 88, 102 n.10 (1971). Furthermore, since this Court mooted the appeal in *County of Los Angeles v. Davis,* 47 U.S.L.W. 4317 (March 27, 1979), the less rigorous "disparate impact" theory developed in *Griggs v. Duke Power Company,* 401 U.S. 424 (1971), may be applicable to suits under Section 1985(3).

sional power to legislate pursuant to the commerce clause. The activity must affect interstate commerce. This limitation is embodied in Title VII's requirement that only employers with fifteen or more employees may be regulated. 42 U.S.C. §2000e(b). There is no such commerce clause limitation on the remedy provided by Section 1985(3). Congress, therefore, never intended the Commerce clause to be a source of power to reach a 1985(3) conspiracy.

The analysis mandated by this Court in *Griffin* looks to a source of congressional power to remedy the right violated *under Section 1985(3).* That the right can be constitutionally remedied under a different statutory scheme such as Title VII is irrelevant.

In *Griffin,* this Court looked to the constitutional basis for Section 1985(3) itself—the thirteenth and fourteenth amendments. Those amendments, however, do not reach the right allegedly violated in this case.[14] Novotny has, therefore, failed to identify a source of congressional power to reach the conspiracy in this case.

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14. Novotny attempts to bring the facts of this case within the thirteenth amendment's prohibition against involuntary servitude. As noted in *Flood v. Kuhn,* 316 F. Supp. 271 (S.D.N.Y., 1970), *aff'd,* 407 U.S. 258 (1972), however, if you have the right to quit your employment, you are not in a state of involuntary servitude. The female employees of the Association certainly had that option.

CONCLUSION

For the reasons stated in this Reply Brief, as well as those stated in the Brief for Petitioners, Petitioners respectfully request that the opinion and order entered by the United States Court of Appeals for the Third Circuit in this matter be reversed.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-753

GREAT AMERICAN FEDERAL SAVINGS & LOAN ASSOCIATION, JOHN A. VIROSTEK, JOSEPH E. BUGEL, JOHN J. DRAVECKY, DANIEL T. KUBASAK, EDWARD J. LESKO, JAMES E. ORRIS, JOSEPH A. PROKOPOVITSH, JOHN G. MICENKO AND FRANK J. VANEK,
Petitioners,

v.

JOHN R. NOVOTNY,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF *AMICUS CURIAE* OF THE EQUAL EMPLOYMENT ADVISORY COUNCIL

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BRIEF *AMICUS CURIAE* OF THE EQUAL EMPLOYMENT ADVISORY COUNCIL

INTEREST OF THE AMICUS CURIAE

This brief of the Equal Employment Advisory Council ("EEAC") as *amicus curiae* in support of the petitioners is submitted with the written consent

of all parties.[1] EEAC is a voluntary nonprofit association organized to promote the common interest of employers and the general public in the development and implementation of sound government policies, procedures and requirements pertaining to nondiscriminatory employment practices. Its membership comprises a broad segment of the employer community in the United States, including both individual employers and trade associations. Its governing body is a Board of Directors composed primarily of specialists in the field of equal employment opportunity, whose combined experience gives the Council a unique depth of understanding of the practical and legal considerations of EEO policies and requirements. Substantially all of EEAC's members, or their constituents, are employers subject to the provisions of Title VII of the Civil Rights Act of 1964, *as amended*, 42 U.S.C. § 2000e *et seq.*, and 42 U.S.C. § 1985(3), as applied by the Court below, as well as other equal employment statutes and regulations. Most of EEAC's member representatives—many of whom are corporate officers—are charged with corporate responsibility for compliance with the various federal, state and local statutes, regulations and orders dealing with equal employment opportunity. As such, they have a direct interest in the principal issue presented by the instant case—*i.e.*, whether 42 U.S.C. § 1985(3) applies to an alleged conspiracy among the officers and directors of a single corporation to violate Title VII. EEAC previously filed a brief *amicus curiae* in this case supporting the petition for certiorari.

[1] Their consents have been filed with the Clerk of the Court.

Because of its interest in issues pertaining to equal employment, EEAC has filed briefs as *amicus curiae* in a number of other recent cases in this Court raising important equal opportunity issues. *See, e.g., Regents of the University of California* v. *Bakke*, 438 U.S. 265 (1978); *County of Los Angeles* v. *Davis*, pending, No. 77-1553; *Kaiser Aluminum & Chemical Corp.* v. *Weber*, pending, No. 78-435; *International Brotherhood of Teamsters* v. *United States*, 431 U.S. 324 (1977); *United Air Lines, Inc.* v. *Evans*, 431 U.S. 553 (1977); and *International Union of Electrical Workers* v. *Robbins & Myers, Inc.*, 429 U.S. 229 (1976).

STATEMENT OF THE CASE

Respondent John R. Novotny brought this suit on December 17, 1976, in the United States District Court for the Western District of Pennsylvania, alleging that petitioner Great American Federal Savings and Loan Association and its officers and directors, the individual petitioners, terminated his employment as an officer of the Association in violation of 42 U.S.C. § 1985(3) and Section 704(a) of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-3(a). Novotny alleged that on or about January 22, 1975, at the Association's annual meeting, the Association and its officers and directors failed to reelect him as an officer and terminated his employment in retaliation for his earlier protest of the Association's alleged discrimination against certain of its female employees.

The Association having moved to dismiss Novotny's complaint, the district court on April 22, 1977, dis-

missed the complaint in its entirety. Pet. App. 76a.[2] In an accompanying opinion, the district court held that a conspiracy under § 1985(3) could not exist because the complaint alleged that only one legal entity, the Association, terminated Novotny. Pet. App. 71a-73a. The court dismissed the Title VII cause of action because in its view § 704(a), the "retaliation" provision, did not protect Novotny's termination in the absence of any allegation that the termination was connected with a Title VII enforcement proceeding. Pet. App. 73a-75a.

The Court of Appeals for the Third Circuit *en banc* reversed the district court on August 7, 1978, with respect to both counts of the complaint. It held that concerted action to deprive an employee of the substantive rights conferred by Title VII could be remedied under § 1985(3), and that the officers and directors of a single corporation acting on its behalf could form a conspiracy covered by § 1985(3). Pet. App. 28a-29a, 36a-40a, 50a-55a. These are the issues on which this Court granted certiorari and are of particular concern to EEAC as *amicus curiae*. The Court of Appeals also reinstated Novotny's claim under § 704(a), and no review of that determination has been sought. Pet. App. 56a-61a.

SUMMARY OF ARGUMENT

I.

The Third Circuit's determination that 42 U.S.C. § 1985(3) provides a remedy for conspiratorial inferences with an employee's Title VII rights is based on an expansive misreading of the statute and its

[2] "Pet. App." refers to the appendix of the Petition for Certiorari filed in this case.

legislative history.[3] The decision below, if sustained by this Court, will lead to the application of § 1985(3) to a host of federal statutory rights for which Congress provided specific remedial schemes exclusive of § 1985(3). It will also seriously undermine the careful administrative/judicial balance Congress adopted for redressing violations of Title VII of the Civil Rights Act of 1964.

Section 1985(3) is the current codification of § 2 of the Ku Klux Klan Act of 1871, a statute aimed

[3] 42 U.S.C. § 1985(3) provides as follows:

> (3) If two or more persons in any State or Territory conspire or go in disguise on the highway or on the premises of another, for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws; or for the purpose of preventing or hindering the constituted authorities of any State or Territory from giving or securing to all persons within such State or Territory the equal protection of the laws; or if two or more persons conspire to prevent by force, intimidation, or threat, any citizen who is lawfully entitled to vote, from giving his support or advocacy in a legal manner, toward or in favor of the election of any lawfully qualified person as an elector for President or Vice President, or as a Member of Congress of the United States; or to injure any citizen in person or property on account of such support or advocacy; in any case of conspiracy set forth in this section, if one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages occasioned by such injury or deprivation, against any one or more of the conspirators.

at providing a federal forum to protect citizens from the violence of the Ku Klux Klan. In the years immediately after the Civil War, protection of federal constitutional rights—particularly those created by the Thirteenth and Fourteenth Amendments—had broken down in the Southern states. Since the state courts were then the primary forum for the protection of federal rights, Congress created in the Ku Klux Klan Act a limited federal forum not otherwise available for redress of certain federal rights. Its aim was not to create parallel remedies where an effective remedy—particularly in a federal court —was already available.

The plaintiff in this case, Novotny, has available to him an effective federal court remedy provided by § 704(a) of Title VII, 42 U.S.C. § 2000e-3(a). Title VII creates both administrative and judicial remedies aimed first at promoting voluntary compliance with Title VII via administrative conciliation, and then, if conciliation fails, at securing the most complete relief possible via federal court litigation. Its "careful blend of administrative and judicial enforcement powers" provides the exclusive means for redressing violations of the statute. *See Brown* v. *GSA*, 425 U.S. 820, 833 (1976). Although, to be sure, Congress contemplated that Title VII would not supplant pre-existing statutory prohibitions against employment discrimination, there is nothing in the legislative history of Title VII indicating that Congress intended that remedies outside of the Title VII scheme would apply to discrimination claims based on Title VII.

II.

Section 1985(3) would not, in any event, be applicable to this case because the complaint does not establish the existence of "two or more persons," the essential ingredient of a conspiracy. *Griffin* v. *Breckenridge*, 403 U.S. 88, 102 (1971). The only individuals claimed to have engaged in a conspiracy in this case are the officers and directors of the Association, all of whom, according to the complaint, "were and are acting on behalf of" the Association. Pet. App. 83a. Under long-settled and widely followed principles of civil conspiracy law, the officers and directors of a single corporation acting on its behalf are the corporation's agents, and together with the corporation constitute a single legal personality. To find a conspiracy in such a circumstance would amount to holding that the corporation conspired with itself. This is contrary to principles long adhered to in various civil law contexts, including cases in the antitrust, contracts and civil rights fields. Except for the Third Circuit, every Court of Appeals follows the traditional rule and it should not now be overturned.

ARGUMENT

I. SECTION 2 OF THE KU KLUX KLAN ACT OF 1871 IS NOT AN ALTERNATIVE MECHANISM FOR ENFORCING RIGHTS CREATED BY TITLE VII OF THE CIVIL RIGHTS ACT OF 1964.

In *Griffin* v. *Breckenridge*, 403 U.S. 88 (1971), this Court resurrected the long dormant Section 2 of the Ku Klux Klan Act of 1871 (Act of April 20, 1871, ch. 22, 17 Stat. 13), now codified as 42 U.S.C. § 1985(3). The case involved four black individuals who were traveling along the highways of Kemper County, Mississippi. Two local white residents mistook the driver of the car of black men for a civil rights worker and blocked the car on the highway. The occupants were forced out, held at bay with firearms, threatened with murder, and then beaten with "deadly blackjacks, pipes or other kinds of clubs." *Id.* at 90-92. The facts of *Griffin* would fit without alteration in the list of outrages described by the Members of the 42d Congress that enacted the Ku Klux Klan Act:

> While murder is stalking abroad in disguise, while whippings and lynchings and banishment have been visited upon unoffending American citizens, the local administrations have been found inadequate or unwilling to apply the proper corrective. Combinations, darker than the night that hides them, conspiracies, wicked as the worst of felons could devise, have gone unwhipped of justice.

CONG. GLOBE, 42d Cong., 1st Sess., App. 374 (1871), *quoted in Monroe* v. *Pape*, 365 U.S. 167, 175 (1961).

Mr. Justice Stewart, writing for the Court in *Griffin*, appropriately characterized the facts as "so close to the core of the coverage intended by Congress that it is hard to conceive of wholly private conduct that would come within the statute if this does not." *Griffin, supra*, 403 U.S. at 103. But he also made clear that § 1985(3) is limited in scope, and is aimed only at conspiracies in which there is "some racial, or perhaps otherwise class-based, invidiously discriminatory animus. . . ." *Id.* at 101-02. The Court declined to decide whether § 1985(3) extends beyond a racially motivated discriminatory intent (*id.* at 102 n.9), but warned of the "constitutional shoals that would lie in the path of interpreting § 1985(3) as a general federal tort law . . . ." *Id.* at 102.

The present case, involving an alleged retaliatory discharge of a white male bank employee, is a far cry from *Griffin* and the concerns of the Congressional sponsors of § 1985(3). Novotny's claim involves no highway marauders, no violence or terror, no racial discrimination, and no interference with a constitutional right to be free of discrimination. If Novotny's dismissal from his job were to be held unlawful, it would only be if the facts established a violation of § 704(a) of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-3(a), which makes it unlawful to retaliate against an employee because he has opposed a practice forbidden by Title VII. However reprehensible one may regard such conduct, such a dismissal by a private employer was not unlawful prior to the enactment of Title VII in 1964. *See, e.g., Willingham* v. *Macon Telegraph Publishing Co.*, 507 F.2d 1084, 1090-91 (5th Cir. 1975) (en banc); *Rosenfeld* v. *Southern Pacific Co.*, 444 F.2d 1219, 1225 (9th Cir. 1971); Note, *Developments in the Law—Employment Discrimination and Title*

VII of the Civil Rights Act of 1964, 84 HARV. L. REV. 1109, 1167 (1971).

The Court of Appeals held that Novotny's allegations, if proved, would constitute a violation of § 704 (a) (Pet. App. 59a-60a), and that holding has not been challenged in this Court. It is therefore clear that Novotny will have a chance to prove his claim, and if he is successful, will be eligible for all the relief provided by Title VII. The sole issue here is whether he should receive additional relief, such as compensatory or punitive damages against the individual defendants, under 42 U.S.C. § 1985(3).

As we shall show below, the Ku Klux Klan Act was never intended to provide an additional or supplemental remedy for violations of federal rights for which other specific remedies are provided by federal law. *See* pp. 10-14 *infra*. If it were now to be so construed, it would indeed be converted into "a general federal tort law." *Griffin*, *supra*, 403 U.S. at 102. Moreover, as we shall also show, the language and legislative history of Title VII make clear that its remedies were intended to be the exclusive means for redressing Title VII violations. *See* pp. 15-23 *infra*. To grant Novotny a cause of action under 42 U.S.C. § 1985(3) for what is nothing more than a violation of Title VII would fly in the face of that clear Congressional intent.

A. Section 1985(3) Has No Application to Federal Statutory Rights For Which Congress Has Provided a Self-Contained Enforcement Scheme.

Although the Third Circuit purported to hold that § 1985(3) applies only to the "deprivation of a right secured by a federal statute guaranteeing equal employment opportunity" (Pet. App. 28a), the opinion

contains no basis for defining those federal statutory rights reached by § 1985(3) and those outside its ambit. Under the court's rationale, virtually any right created by federal statute, particularly those enacted under the Commerce Clause like Title VII, could be enforced by § 1985(3).[4] This anomalous result could only be reached, we believe, by failing to place § 1985(3) in its historical context. *See District of Columbia* v. *Carter*, 409 U.S. 418, 420 (1973); *cf. Boys Market, Inc.* v. *Retail Clerks Union*, 398 U.S. 235, 250 (1970).

In this modern age when federal rights are routinely enforced in a federal judicial forum, it is easy to overlook the revolutionary nature of the step Congress took in 1871 when it enacted the Ku Klux Klan Act. *See Monroe* v. *Pape*, *supra*, 365 U.S. at 252-53 (Frankfurter, J., dissenting). At that time, there was no federal question jurisdiction in the federal

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[4] The deprivation of a wide assortment of statutory rights, including several based on Congress' Commerce Clause power, has already been held to state a cause of action under § 1985 (3) and indicates the potentially unlimited reach of the statute under the Third Circuit's interpretation. *See, e.g.*, Hodgin v. Jefferson, 447 F. Supp. 804, 808 (D. Md. 1978) (violation of Federal Equal Pay Act states claim under § 1985(3)); Local No. 1(ACA) v. Int'l Bhd. of Teamsters, 419 F. Supp. 263, 276 (E.D. Pa. 1976) (violation of Labor-Management Reporting and Disclosure Act states claim under § 1985(3)); Murphy v. Operating Engineers, Local 18, —— F. Supp. ——, 99 L.R.R.M. 2074, 2126 (N.D. Ohio 1978) (violation of Labor-Management Reporting and Disclosure Act states § 1985(3) claim). We believe these cases, like the decision below, to have been wrongly decided.

courts.[5] Federal rights, whether constitutional or statutory, were enforceable only in state courts subject to appellate review by the Supreme Court of the United States. *See id.* at 252. State enforcement of the rights created by the newly ratified post-Civil War Constitutional amendments, however, had broken down due largely to violent resistance by the Ku Klux Klan. *See Monroe* v. *Pape*, *supra*, 365 U.S. at 172-73, *quoting* Message of President Grant, CONG. GLOBE, 42d Cong., 1st Sess. 244 (1871); *see also id.* at 174-81. In direct response, Congress in 1871 created a federal forum to secure the Fourteenth Amendment rights against hostile or ambivalent state officials or non-official marauders. *See District of Columbia* v. *Carter*, *supra*, 409 U.S. at 423, 427-29 (1973); *Lynch* v. *Household Finance Corp.*, 405 U.S. 538, 545 (1972); *Monroe* v. *Pape*, *supra*, 365 U.S. at 171. Section 1 of the 1871 Ku Klux Klan Act, now 42 U.S.C. § 1983, was directed at constitutional deprivations caused by official state action or neglect by state officials. *See* CONG. GLOBE, 42d Cong., 1st Sess., App. 85, 153 (1871), *quoted in Monell* v. *Department of Social Services*, 436 U.S. 658, 685-86 n.45 (1978). Section 2, the precursor of 42 U.S.C. § 1985 (3), was aimed at private conspiracies—particularly the Ku Klux Klan[6]—that interfered with or prevented state officials from carrying out their duties in enforcing the federal right to equal protection

[5] Federal question jurisdiction was first conferred on the federal courts by the Act of March 3, 1875, § 1, 18 Stat. 470 (1875). *See* 13 WRIGHT, MILLER & COOPER, FEDERAL PRACTICE & PROCEDURE § 3561, at 389 (1975); District of Columbia v. Carter, 409 U.S. 418, 427 n.20 (1973).

[6] *See* Monell v. Dep't of Social Services, 436 U.S. 658, 665 & n.11 (1978).

of the law.[7] Thus, with the enactment of the 1871 Ku Klux Klan Act, Congress sought to provide a federal forum not otherwise available for redress of federal rights.

When this Court in *Griffin* revitalized § 1985(3) one hundred years after its enactment, it did so in a case where the protection of the victimized black individuals would otherwise be dependent on the state's judicial system. Indeed, there is little to distinguish the Mississippi highway marauders described in *Griffin* from the Klan whose activities a century before inspired the precursor of § 1985(3). In contrast, the plaintiff Novotny is far from dependent on § 1985(3) for a federal forum. He may have a

[7] This point is illustrated by the remarks of Representative Poland during the debate on § 1985(3)'s ancestor:

> . . . if a State shall deny the equal protection of the laws, or if a State make proper laws and have proper officers to enforce those laws, and somebody undertakes to step in and clog justice by preventing the State authorities from carrying out this constitutional provision, then I do claim that we have the right to make such interference an offense against the United States; that the Constitution does empower us to aid in carrying out this injunction, which, by the Constitution, we have laid upon the States, that they shall afford the equal protection of the laws to all their citizens. When the State has provided the law, and has provided the officer to carry out the law, then we have the right to say that anybody who undertakes to interfere and prevent the execution of that State law is amenable to this provision of the Constitution, and to the law that we may make under it declaring it to be an offense against the United States.

CONG. GLOBE, 42d Cong., 1st Sess. 514 (1871), *quoted in* Monroe v. Pape, 365 U.S. 167, 201 n.10 (1961) (Harlan, J., concurring).

viable claim under § 704(a) of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-3(a), recognized as such by the Third Circuit (Pet. App. 59a-60a) and unchallenged here. Novotny is eligible for relief in a federal court under a comprehensive federal remedial scheme. If he proves his allegations on remand, he would, like all other Title VII plaintiffs, be made "whole for injuries suffered on account of unlawful employment discrimination." *Albemarle Paper Co.* v. *Moody*, 422 U.S. 405, 418 (1975); *see also International Brotherhood of Teamsters* v. *United States*, 431 U.S. 324, 367 (1977).

The aim of the 42d Congress in enacting the Ku Klux Klan Act was to provide one reliable forum to protect federal rights, and not simply to create parallel federal remedies where an adequate federal remedy is already available. "[T]he dominant jurisdictional thought of the day," as Mr. Justice Frankfurter has pointed out, was "that redress in a federal trial court was . . . to be very sparingly afforded." *Monroe* v. *Pape*, *supra*, 365 U.S. at 253 (dissenting opinion). The Third Circuit's expansion of § 1985(3) to create a federal remedy paralleling an effective federal remedy already in existence thus is inconsistent with § 1985(3)'s limited aim of protecting otherwise unprotected federal rights.[8]

[8] Since § 1985(3) rarely, if ever, will be coextensive with the federal remedy enacted as part of a substantive statutory scheme, § 1985(3), if construed as providing a parallel remedy to other federal relief, is likely to undermine the Congressional judgment as to particular forms of relief or types of enforcement mechanisms intended to protect a particular federal statutory right. Thus, as the Third Circuit acknowledged, § 1985(3) may provide under those circumstances a private remedy where Congress, as part of the substantive statute, deliberately withheld creating a private right of action as the vehicle for enforcing the federal right. Pet. App. 28a. *Compare* Fair Labor Standards Act § 16(b), *as amended*, 29 U.S.C. § 216(b) (private right to sue under Fair Labor Standards Act and Equal Pay Act terminates upon filing of complaint by Secretary of Labor) *with* Hodgin v. Jefferson, *supra* note 4, 447 F.Supp. at 808 (§ 1985(3) provides alternative remedy for violation of Equal Pay Act). *See also* note 20 *infra*.

B. Title VII Establishes an Exclusive Comprehensive Scheme for Enforcing the Rights Created by That Title.

In concluding that Title VII rights could be enforced through 42 U.S.C. § 1985(3), the Court of Appeals gave scant attention to the remedies provided by Title VII itself. It spoke broadly about sex discrimination and "equal privileges and immunities under the laws" (Pet. App. 16a-18a, 29a-36a), but completely overlooked this Court's recent decision in *Brown* v. *GSA*, 425 U.S. 820 (1976), which strongly implied that the remedial scheme of Title VII was the exclusive means for redressing Title VII violations.[9] *Id.* at 829.

In *Brown*, the Court analyzed § 717 of the Equal Employment Opportunity Act of 1972, 42 U.S.C. § 2000e-16, the component of Title VII addressed to the rights and remedies of federal employees. Its conclusion was that the "balance, completeness and structural integrity" of § 717 independently com-

[9] As we explain more fully at a later point, we distinguish between remedies for violations of Title VII and remedies for violations of other statutes. The limitation upon Title VII remedies applies only to Title VII rights; preexisting substantive rights under other statutes are not supplanted by Title VII. *See* pp. 21-23 *infra*.

pelled the holding that Title VII should be the exclusive method by which federal employees may secure redress from employment discrimination. *Id.* at 832. Had the Third Circuit applied the *Brown* method of analysis to the problem of the private employee in the case before it, the court logically would also have had to conclude that remedies for violations of rights created by Title VII are limited to those contained in Title VII itself.[10]

Like § 717, the hallmark of Title VII's remedial scheme for employees in the private sector is "a careful blend of administrative and judicial enforcement powers." *Id.* at 833. Under § 717, a federal employee first seeks administrative relief from his employing agency and then may seek review from the Civil Service Commission. An aggrieved federal employee must exhaust administrative procedures before being eligible to file suit in federal court. *Id.* at 831-32. Under Title VII, an aggrieved private employee similarly may seek relief from employment discrimination by filing an informal complaint with the Equal Employment Opportunity Commission. § 706(b), *as amended*, 42 U.S.C. § 2000e-5(b). The Commission, with state and local equal employment agencies, is given broad authority to investigate and

[10] This Court employed a similar analysis to achieve a similar result earlier this Term in Int'l Bhd. of Teamsters v. Daniel, —— U.S. ——, 99 S.Ct. 790, 801-02 (1979). The Court there concluded that the specific and comprehensive provisions of the Employee Retirement Income Security Act of 1974 govern employee pension plans to the exclusion of the more generally directed Securities Act and Securities and Exchange Act. *See also* Califano v. Sanders, 430 U.S. 99, 104-07 (1977); Preiser v. Rodriguez, 411 U.S. 475, 488-90 (1973); Johansen v. United States, 343 U.S. 427, 439 (1952).

conciliate the claimed violation of Title VII, termed an "unlawful employment practice." §§ 703(a), 706(b)-(e) *as amended*, 42 U.S.C. §§ 2000e-2(a), 2000e-5(b)-(e); *Alexander* v. *Gardner-Denver Co.*, 415 U.S. 36, 44 (1974). If conciliation fails or the statutory time allotted for conciliation has been exhausted, either the Commission or the aggrieved party may then file suit in federal court. § 706(f)(1), *as amended*, 42 U.S.C. 2000e-5(f)(1).[11] The federal court may fashion whatever relief is necessary. § 706(g), *as amended*, 42 U.S.C. § 2000e-5(g). Though not identical in every respect, both § 717 and the provisions of Title VII applicable to private employees thus provide "an integrated, multistep enforcement procedure" [12] for the orderly and full consideration of employment discrimination claims.

Title VII's legislative history, moreover, demonstrates that its detailed administrative/judicial enforcement machinery was carefully designed to balance the competing interests involved in an employment discrimination complaint. *See Occidental Life Insurance Co.* v. *EEOC*, 432 U.S. 355, 359, 372-73 (1977). Delegation of enforcement authority to the Commission shifts the burden of prosecution from the individual complainant, assures employers that the agency issuing discrimination guidelines will also be the agency enforcing compliance, and encourages the settlement of disputes through informal conciliation

[11] An aggrieved party must also secure a "right to sue letter" from the EEOC before initiating suit. § 706(f)(1), *as amended*, 42 U.S.C. § 2000e-5(f)(1); Alexander v. Gardner-Denver Co., 415 U.S. 36, 47 (1974).

[12] Occidental Life Ins. Co. v. EEOC, 432 U.S. 355, 359 (1977).

rather than formal judicial proceedings. *See* Note, *Developments in the Law—Employment Discrimination and Title VII of the Civil Rights Act of 1964*, 84 HARV. L. REV. 1109, 1200, 1270 (1971). Creation of jurisdictional prerequisites to an individual's right to bring suit in a federal court affords the Commission "an opportunity to settle disputes through conference, conciliation, and persuasion," indisputably the "preferred means for achieving [the] goal" of Title VII. *Alexander* v. *Gardner-Denver Co.*, *supra*, 415 U.S. at 44. Authorization of a private right of action, however, allows the individual to escape the administrative machinery if it is not working.[13] *Oc-*

[13] In a section-by-section analysis of the 1972 amendments to Title VII, Senator Williams, the floor manager of the bill, explained:

> In providing this remedy, it is intended that recourse to this form of remedy will be the exception and not the rule, and that the vast majority of complaints will be handled through the offices of the EEOC. However, as the individual's rights to redress are paramount under the provisions of Title VII, it is necessary that all avenues of relief be left open for quick and effective relief.
>
> In providing for the individual right to sue in the event that action by the Commission is unsatisfactory or unresponsive, it is not intended that duplication of proceedings should be allowed. Therefore, in any proceeding where the General Counsel or the Attorney General, as the case may be, is proceeding with due diligence within the time limits specified in this subsection, the person aggrieved would be precluded from instituting an individual action until such time as one of the specific conditions of this subsection are not met.

SENATE COMM. ON LABOR & PUBLIC WELFARE, 92D CONG., 2D SESS., LEGISLATIVE HISTORY OF THE EQUAL EMPLOYMENT OPPORTUNITY ACT OF 1972, at 1772 (1972) (hereinafter 1972 LEGISLATIVE HISTORY).

cidental Life Insurance Co. v. *EEOC*, *supra*, 432 U.S. at 362-66. Ultimate resort to the federal courts also delegates the task of investigation and fact-finding to the agency that has the specialized knowledge and resources to do so, while insuring that the private claimant will receive the most complete relief possible. FRIENDLY, FEDERAL JURISDICTION: A GENERAL VIEW 76, 64 (1973); Sape & Hart, *Title VII Reconsidered: The Equal Employment Opportunity Act of 1972*, 40 GEO. WASH. L. REV. 824, 881 (1972).

Allowing a Title VII claimant immediate access to the courts under § 1985(3) would circumvent this "careful and thorough remedial scheme." *Brown* v. *GSA*, *supra*, 425 U.S. at 833; *cf. Preiser* v. *Rodriguez*, 411 U.S. 475, 489-90 (1973). By pleading a conspiracy to violate Title VII and invoking § 1985(3), a claimant can avoid Title VII's limitations on filing time,[14] back pay,[15] jury trial,[16] and punitive damages.[17]

[14] *Compare* United Air Lines, Inc. v. Evans, 431 U.S. 553, 555 (1977) (Title VII charge must be filed with EEOC within 90 days), *with* Davis v. United States Steel Supply, 581 F.2d 335, 337 (3d Cir. 1978) (state law determines statute of limitations for actions under Civil Rights Acts).

[15] *See* § 706(g), 42 U.S.C. § 2000e-5(g) (Title VII's two year limit on back pay).

[16] *Compare* Cameron v. Brock, 473 F.2d 608, 609 (6th Cir. 1973) (jury trial in § 1985(3) action) *with*, *e.g.*, Slack v. Havens, 522 F.2d 1091, 1094 (9th Cir. 1975) (no jury trial provided in Title VII suits, joining Fourth, Fifth, and Sixth Circuits); Lorillard v. Pons, 434 U.S. 575, 583-85 (1978) (emphasizes equitable nature of Title VII suit although not deciding jury trial issue).

[17] *See* Richerson v. Jones, 551 F.2d 918, 926 (3d Cir. 1977) (punitive damages may not be recovered under Equal Employment Opportunity Act of 1972).

Yet each of these provisions, no less than Title VII's blend of forums, reflects a deliberate choice made by Congress in 1964 and 1972.[18] A § 1985(3) plaintiff might also plan to circumvent the EEOC's notorious backlog of cases.[19] In so doing, however, the "crucial administrative role" of the EEOC (*cf. Brown* v. *GSA*, *supra*, 425 U.S. at 833) is clearly undermined. Congress was well aware of the EEOC's backlog in 1972, yet it reinforced the Commission's conciliation role

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[18] The backpay formula, for example, limits recovery to two years prior to the time a charge is filed with the Commission. § 706(g), *as amended*, 42 U.S.C. § 2000e-5(g). The two year limit protects employers from liability extending back to the effective date of the 1964 Act, while the calculation date from filing a Commission charge, rather than from filing a court action, prevents an employee from being penalized for filing with the Commission. The compromise that created this formula is discussed in Sape & Hart, *Title VII Reconsidered: The Equal Employment Opportunity Act of 1972*, 40 GEO. WASH. L. REV. 824, 881-82 (1972).

[19] *See* Occidental Life Insurance Co. v. EEOC, *supra* note 12, 432 U.S. at 369. According to the EEOC's Vice Chairman, Daniel Leach, the Commission's 1977 backlog in three model offices alone amounted to 10,300 cases. Leach, *Title VII of the Civil Rights Act and the EEOC: An Agency in the Midst of Change*, 29 MERCER L. REV. 661, 669 n.36 (1978). This problem is being alleviated by the institution of the Commission's new streamlined procedures that has resulted in an 11% reduction in backlog of three model offices within 14 weeks. *Id.* at 669 n.36. In view of the geometric increase in the number of private civil rights cases filed in federal district courts over recent years, and the potential litigation that could follow the Third Circuit's decision, the backlog of the district courts could exceed that of the EEOC's. *See* FRIENDLY, FEDERAL JURISDICTION: A GENERAL VIEW 16, 17, 75 & n.4 (1973).

with substantial additional enforcement powers.[20] *Occidental Life Insurance Co.* v. *EEOC*, *supra*, 432 U.S. at 369-70; *see 1971-1972 Annual Survey of Labor Relations Law*, 13 B.C. INDUS. & COM. L. REV. 1347, 1366-67 (1972). The threat to Title VII's remedial scheme implicit in sanctioning independent enforcement of Title VII rights led the Fourth Circuit to reject the position embraced here by the Third. *See Doski* v. *M. Goldseker Co.*, 539 F.2d 1326, 1334 (4th Cir. 1976). The Third Circuit's position, antithetical to this Court's holding in *Brown* v. *GSA*, now merits rejection by this Court.

A holding that enforcement of Title VII rights is limited to the remedies found in Title VII would not conflict with the clear Congressional intent that other protections against employment discrimination were not to be supplanted by enactment of Title VII. *See Alexander* v. *Gardner-Denver Co.*, *supra*, 415 U.S. at 48-49; *Johnson* v. *Railway Express Agency, Inc.*, 421 U.S. 454, 459 (1975); *International Union of Electrical Workers* v. *Robbins & Myers, Inc.*, 429 U.S. 229, 236 (1976). The same conduct may violate an employee's rights under Title VII, under 42 U.S.C. § 1981, and under a collective bargaining agreement. In that case, the employee's claim stems from three independent sources of federal substantive law, each of which contemplates its own remedies without exclusion of the others. *See Alexander* v. *Gardner-*

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[20] While the pendency of EEOC-initiated Title VII litigation on behalf of an aggrieved individual is intended to preclude a parallel Title VII suit by that individual (*see* note 13 *supra*), the individual could circumvent that limitation if dissatisfied with the progress of the litigation by initiating a separate § 1985(3) suit, perhaps even in another district court.

Denver Co., supra, 415 U.S. at 49-50; *Johnson* v. *Railway Express Agency, supra*, 421 U.S. at 459; *International Union of Electrical Workers* v. *Robbins & Myers, Inc., supra*. Before a statute other than Title VII can be used to remedy claims also arising under Title VII, a right with an independent statutory source must be found. Section 1985(3) is not such a statute since it creates no substantive rights; it is purely remedial in that it enforces rights created somewhere else.[21] It does not, in itself prohibit private employment discrimination, or retaliation against employees who opposed such discrimination.

Accordingly, Novotny would have no possible claim under § 1985(3) were it not for the fact that Title VII prohibits discrimination in employment based on sex, and protects employees who oppose such discrimination against retaliatory action by their employers. *See Doski* v. *Goldseker Co., supra*, 539 F.2d at 1334. However Title VII not only creates these rights and protections, but also provides a comprehensive "unitary" remedial scheme for their enforcement.[22] The exclusivity of such a remedial scheme for Title VII rights is not inconsistent with the preservation of other pre-1964 substantive statutes aimed at eliminating employment discrimination.

[21] *See* Pet. App. 26a-27a; Cohen v. Illinois Inst. of Technology, 524 F.2d 818, 828 (7th Cir. 1975), *cert. denied*, 425 U.S. 943 (1976) (Stevens, J.); Bellamy v. Mason's Stores, Inc., 508 F.2d 504, 507 (4th Cir. 1974); McLellan v. Mississippi Power & Light Co., 545 F.2d 919, 927 (5th Cir. 1977) (en banc), Note, *The Scope of Section 1985(3) Since Griffin v. Breckenridge*, 45 GEO. WASH. L. REV. 239, 245-51 (1977); Note, *Federal Power to Regulate Private Discrimination: The Revival of the Enforcement Clauses of the Reconstruction Era Amendments*, 74 COLUM. L. REV. 449, 498 (1974). *Contra*, Action v. Gannon, 450 F.2d 1227, 1235 (8th Cir. 1971) (en banc); Comment, *Private Conspiracies to Violate Civil Rights: McLellan v. Mississippi Power & Light Co.*, 90 HARV. L. REV. 1721, 1724-27 (1977).

The fact that the plaintiff, Novotny, would not have had a § 1985(3) claim prior to 1964 also refutes the Court of Appeals' argument that "if rights protected by Title VII are to be excluded from the scope of § 1985(3), such result must flow from the fact that Title VII worked a partial repeal of § 1985(3) . . . ." Pet. App. 38a. The issue is not one of repeal of § 1985(3), but one of its applicability to a comprehensive remedial scheme established to enforce subsequently enacted federal rights.

II. THE ALLEGATION OF A CONSPIRACY AMONG THE OFFICERS AND DIRECTORS OF A SINGLE CORPORATION ACTING ON BEHALF OF THE CORPORATION DOES NOT SATISFY THE "TWO OR MORE PERSONS" ELEMENT OF 42 U.S.C. § 1985(3).

The Third Circuit's holding that Title VII rights may be redressed under 42 U.S.C. § 1985(3) was premised on its equally novel conclusion that a corporation and its officers and directors, acting within the scope of their employment, constitute more than one person for the purpose of counting conspirators in a civil action. Pet. App. 50a-55a. In so concluding, the Third Circuit flouted a fundamental principle of corporate law: that when several individuals are "consolidated and united into a corporation, they and their successors are then considered as one person in

[22] *See* 1972 LEGISLATIVE HISTORY, *supra* note 13, at 1512 (remarks of Senator Javits).

law . . . ." 2 BLACKSTONE, COMMENTARIES ch. 18, at 468 (Tucker ed. 1803); *see Trustees of Dartmouth College* v. *Woodward*, 17 U.S. (4 Wheat.) 518, 636 (1819). The concept that the individuals who compose a corporation constitute but a single legal person has, accordingly, been recognized by every circuit but the Third as precluding a finding of conspiracy when the only actors are a corporation's officers and directors.[23]

The common rationale in these and similar civil conspiracy cases, whether arising under § 1985(3),[24]

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[23] *See, e.g.*, Walker v. Providence Journal Co., 493 F.2d 82, 87 (1st Cir. 1974); Girard v. 94th St. and Fifth Ave. Corp., 530 F.2d 66, 70-71 (2d Cir.), *cert. denied*, 425 U.S. 974 (1976); Greenville Publishing Co. v. Daily Reflector, Inc., 496 F.2d 391, 399 (4th Cir. 1974); Nelson Radio & Supply Co. v. Motorola, Inc., 200 F.2d 911, 914 (5th Cir. 1952), *cert. denied*, 345 U.S. 925 (1953); Fallis v. Dunbar, 532 F.2d 1061 (6th Cir. 1976) (per curiam); Dombrowski v. Dowling, 459 F.2d 190, 196 (7th Cir. 1972) (Stevens, J.); Baker v. Stuart Broadcasting Co., 505 F.2d 181, 183 (8th Cir. 1974); Joseph E. Seagram & Sons, Inc. v. Hawaiian Oke & Liquors, Ltd., 416 F.2d 71, 82-83 (9th Cir. 1969), *cert. denied*, 396 U.S. 1062 (1970); Zelinger v. Uvalde Rock Asphalt Co., 316 F.2d 47, 52 (10th Cir. 1963); Poller v. Columbia Broadcasting System, Inc., 284 F.2d 599, 603 (D.C. Cir. 1960), *rev'd on other grounds*, 368 U.S. 464 (1962).

[24] *See, e.g.*, Girard v. 94th St. & Fifth Ave. Corp., *supra* note 23, 530 F.2d at 70-71; Bellamy v. Mason's Stores, Inc., 508 F.2d 504 (4th Cir. 1974) (Boreman, J., concurring); Chambliss v. Foote, 421 F. Supp. 12, 15 (E.D. La. 1976), *aff'd per curiam*, 562 F.2d 1015 (5th Cir. 1977), *cert. denied*, 439 U.S. ——, 99 S. Ct. 127 (1978); Jones v. Tennessee Eastman Co., 397 F. Supp. 815, 816 (E.D. Tenn. 1974), *aff'd mem.*, 519 F.2d 1402 (6th Cir. 1975); Dombrowski v. Dowling, *supra* note 23, 459 F.2d at 196; Baker v. Stuart Broadcasting, *supra* note 23, 505 F.2d at 183. *Accord*, Comment, *Private Conspiracies to Violate Civil Rights: McLellan v. Mississippi Power & Light Co.*, 90 HARV. L. REV. 1721, 1723 n.15 (1977).

§ 1 of the Sherman Act,[25] or other contexts,[26] is that because a corporation can act only through its officers

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[25] *See, e.g.*, Walker v. Providence Journal Co., *supra* note 23, 493 F.2d at 87; Person v. N.Y. Post Corp., 427 F. Supp. 1297, 1307 (E.D.N.Y.), *aff'd mem.*, 573 F.2d 1294 (2d Cir. 1977); Greenville Publishing Co. v. Daily Reflector, Inc., *supra* note 23, 496 F.2d at 399; H.&B. Equip. Co. v. Int'l Harvester Co., 577 F.2d 239, 244 (5th Cir. 1978); Tamaron Distrib. Corp. v. Weiner, 418 F.2d 137, 139 (7th Cir. 1969); Morton Bldgs. of Neb., Inc. v. Morton Bldgs., Inc., 531 F.2d 910, 916-17 (8th Cir. 1976); Jos. E. Seagram & Sons, Inc. v. Hawaiian Oke & Liquors, Ltd., *supra* note 23, 416 F.2d at 82-83; Poller v. Columbia Broadcasting System, Inc., *supra* note 23, 284 F.2d at 603.

The Fifth Circuit's decision in Nelson Radio & Supply Co. v. Motorola, Inc., 200 F.2d 911, 914 (5th Cir. 1952), *cert. denied*, 345 U.S. 925 (1953), is frequently cited as the fountainhead of this rule not just for Sherman Act § 1 cases but for other civil conspiracies. Pet. App. 52a n.117. But the fact is that cases antedating *Nelson Radio* adhered to the rule. *See* Arthur v. Kraft-Phenix Cheese Corp., 26 F. Supp. 824, 829-30 (D. Md. 1937); Neumann v. Bastian-Blessing Co., 70 F. Supp. 447, 449-50 (N.D. Ill. 1947). The Third Circuit initially followed *Nelson Radio* in Goldlawr, Inc. v. Shubert, 276 F.2d 614, 617 (3d Cir. 1960), but then declined to approve or disapprove it in Johnston v. Baker, 445 F.2d 424, 427 (3d Cir. 1971), and rejected it in the instant case. Most commentators, however, approve the *Nelson Radio* rule. *See, e.g.*, Note, *Intra-Enterprise Conspiracy Under Section 1 of the Sherman Act: A Suggested Standard*, 75 MICH. L. REV. 717 (1977); Willis & Pitofsky, *Antitrust Consequences of Using Corporate Subsidiaries*, 43 N.Y.U.L. REV. 20, 24 n.15 (1968).

[26] *See, e.g.*, Dorsey v. Chesapeake & O. Ry., 476 F.2d 243, 245-46 (4th Cir. 1973) (per curiam); Pearson v. Youngs-

and directors—in effect, its agents—a conspiracy between the corporation and its officials is tantamount to the corporation conspiring with itself.[27] Only the Third Circuit has chosen to depart from this well-settled principle of civil conspiracy law.

To support its holding, the Court of Appeals argued that counting corporate officers and directors as separate persons in a conspiracy action is necessary to avoid immunizing their wrongful conduct. Pet. App. 51a. In particular, the court hypothesized that individuals agreeing to harass blacks who register to vote could escape liability under § 1985(3) simply by incorporating. *Id.* at 51a-52a. To reach this type of conduct, however, it is necessary only to apply and not to discard the traditional rule of civil conspiracy. As pointed out by Judge (now Mr. Justice) Stevens in his *Dombrowski* opinion:

> Agents of the Klan certainly could not carry out acts of violence with impunity simply because they were acting under orders from the Grand Dragon.

Dombrowski v. *Dowling*, *supra*, 459 F.2d at 196. That is because when a corporation is a mere instrumentality formed to achieve a forbidden result, lower federal courts have recognized an exception to the traditional rule. *See, e.g., Cole* v. *University of Hartford*, 391 F. Supp. 888, 893 & n.9 (D. Conn. 1975); *Beacon Fruit & Produce Co.* v. *H. Harris & Co.*, 152 F. Supp. 702, 704 (D. Mass. 1957). A second exception arises when the acting officers and directors have an independent personal stake in the object of the conspiracy. *See, e.g., Johnston* v. *Baker*, 445 F.2d 424, 427 (3d Cir. 1971); *Greenville Publishing Co.* v. *Daily Reflector, Inc.*, *supra*, 496 F.2d at 399 & n. 16; *H.&B. Equipment Co.* v. *International Harvester Co.*, 577 F.2d 239 (5th Cir. 1978). The type of situation feared by the Third Circuit, consequently, would not "immunize" its wrongful actors. On the contrary, individuals who incorporate to escape liability for harassing black voters would quickly find their corporation "pierced" and themselves held individually liable as co-conspirators. Thus, the Third Circuit un-

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town Sheet & Tube Co., 332 F.2d 439, 442 (7th Cir.), *cert. denied*, 379 U.S. 914 (1964); Zelinger v. Uvalde Rock Asphalt Co., *supra* note 23, 316 F.2d at 52.

[27] In reaching its decision, the Court of Appeals disclaimed any need to pass on the question of whether "a corporation cannot conspire with itself." Pet. App. 52a. The court took this position by construing the § 1985(3) claim in Novotny's complaint as directed against only the individual defendants, not the corporation. *Ibid.* In our view, this is a myopic way of looking at this case. Although the complaint does not specifically name the corporation as a co-conspirator, the essence of Novotny's § 1985(3) claim, as reflected in paragraph 33 of the complaint, is that the corporation, through the action of its board of directors and officers, terminated Novotny's employment. Pet. App. 83a. Furthermore, the rule of conspiracy law to be applied is the same whether or not the corporation is named. Just as a single corporation cannot conspire with itself, or with its officers and directors, the officers and directors acting on its behalf cannot legally be contemplated as conspiring with each other. *See, e.g.*, Zelinger v. Uvalde Rock Asphalt Co., *supra* note 23, 316 F.2d at 52; Poller v. Columbia Broadcasting System, Inc., *supra* note 23, 284 F.2d at 603; Koehring Co. v. Nat'l Automatic Tool Co., 257 F. Supp. 282, 290 n.6 (S.D. Ind. 1966), *aff'd per curiam*, 385 F.2d 414 (7th Cir. 1967).

necessarily rejected the traditional rule of civil conspiracy.[28]

[28] In support of its decision, the court below relied exclusively on criminal conspiracy cases that follow a different rule from that applied in civil conspiracy cases. Pet. App. 53a-55a. It ignored the fact that this difference stems from the different jurisprudential functions served by criminal and civil conspiracy remedies.

The court also suggested that the traditional civil rule was inapplicable when the claim alleged a continuing policy, rather than an isolated act of discrimination. Pet. App. 55a n.125. In so holding, the Third Circuit relied on dictum in *Dombrowski* which it believed limited the traditional rule to "a single act of discrimination by a single business entity . . . ." 459 F.2d at 196. *Dombrowski* involved only a single isolated instance of discrimination and hence did not hold that a conspiracy would have been established if the plaintiff in that case had alleged multiple discriminatory acts instead of the single act actually alleged. The Second Circuit has declined to find a conspiracy where multiple acts by a corporation's office and directors amount to a single policy of discrimination. *See* Girard v. 94th St. & Fifth Ave. Corp., *supra* note 23, 530 F.2d at 71. Only District Courts within Pennsylvania have adhered to the notion that concerted action by corporate officers and directors, acting within their authority, constitutes a conspiracy when multiple, but not single, acts of discrimination are alleged. *See, e.g.*, Rackin v. Univ. of Pa., 386 F. Supp. 992, 1005-06 (E.D. Pa. 1974); Dupree v. Hertz Corp., 419 F. Supp. 764, 766 (E.D. Pa. 1976); Jackson v. Univ. of Pittsburgh, 405 F. Supp. 607, 612-13 (W.D. Pa. 1975). *But see* Johnson v. Univ. of Pittsburgh, 435 F. Supp. 1328, 1370 (W.D. Pa. 1977).

We submit that the existence *vel non* of a conspiracy has nothing to do with the number of acts of discrimination alleged but with the relationship among the actors. *See* Coley v. M&M Mars, Inc., —— F. Supp. ——, 18 FEP Cas. 1809, 1811 (M.D. Ga. 1978). One recent district court decision rejected the distinction based on the number of discriminatory

The implications of the Third Circuit's conspiracy decision are far-reaching and transcend the civil rights field. Because a corporation can act only through its officers and directors, the effect of the court's decision is automatically to transform all corporate violations of Title VII into violations of § 1985 (3). In view of the fact that all but a handful of Title VII cases involve corporate employers, the impact of the Third Circuit's conspiracy holding, if permitted to stand, will be radically to expand the scope and complexity of virtually every Title VII case. Certainly, there is nothing peculiar to Title VII, which is aimed primarily at the business entity that discriminates rather than at individual third parties,[29] to justify so vastly expanded a theory of liability. *Cf. Johnson* v. *Railway Express Agency, Inc.*, 421 U.S. 454, 464 (1975). It therefore follows that if concerted action by corporate officers and directors acting on behalf of the corporation satisfies

acts alleged for essentially this reason, but then adopted the equally untenable position that all acts of discrimination by corporate management are, in a sense, *ultra vires* unless it affirmatively can be shown that the discrimination was explicitly authorized by the corporation. Scott v. Bd. of Educ., —— F. Supp. ——, 18 FEP Cas. 1230, 1237 (D. Md. 1977). That theory and its implications have been widely discredited in other contexts. *See, e.g.*, New York Cent. & H.R.R.R. v. United States, 212 U.S. 481, 493-94 (1909); Egan v. United States, 137 F.2d 369, 379 (8th Cir.), *cert. denied*, 320 U.S. 788 (1943); United States v. Hilton Hotels Corp., 467 F.2d 1000, 1004-07 (9th Cir. 1972), *cert. denied*, 409 U.S. 1125 (1973). Plainly, the corporate officers here were authorized to adopt personnel hiring and firing policy, and if in doing so they stumbled into a violation of Title VII, their act was no less an authorized one than any other employee dismissal.

[29] *See* 1972 LEGISLATIVE HISTORY, *supra* note 13, at 1512.

the "two or more persons" required of § 1985(3), the rule is jeopardized in its antitrust and corporate law contexts as well.

CONCLUSION

The judgment of the Court of Appeals for the Third Circuit, insofar as it set aside the dismissal of respondent's claim under 42 U.S.C. § 1985(3), should be reversed.

Respectfully submitted,

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March 1979

FOR ARGUMENT

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-753

GREAT AMERICAN FEDERAL SAVINGS & LOAN ASSOCIATION, JOHN A. VIROSTEK, JOSEPH E. BUGEL, JOHN J. DRAVECKY, DANIEL T. KUBASAK, EDWARD J. LESKO, JAMES E. ORRIS, JOSEPH A. PROKOPOVITSH, JOHN G. MICENKO AND FRANK J. VANEK,

Petitioners,

—v.—

JOHN R. NOVOTNY,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF *AMICUS CURIAE* OF THE AMERICAN CIVIL LIBERTIES UNION AND THE AMERICAN CIVIL LIBERTIES UNION OF PENNSYLVANIA

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BRIEF AMICI CURIAE OF THE AMERICAN CIVIL LIBERTIES UNION AND THE AMERICAN CIVIL LIBERTIES UNION OF PENNSYLVANIA

INTEREST OF THE AMICI CURIAE

This brief of the American Civil Liberties Union and the Pennsylvania Civil Liberties Union as amici curiae in support of the respondent is submitted with the written consent of all parties. The consents have been filed with the Clerk of the Court.

The American Civil Liberties Union ("ACLU") is a nationwide, nonpartisan organization of over 250,000 members dedicated to defending the right of all persons to equal treatment under the law. The American Civil Liberties Union of Pennsylvania is the state affiliate of the ACLU operating in Pennsylvania.

Recognizing that confinement of women's opportunities is a pervasive problem at all levels of society, the American Civil

Liberties Union Foundation has established a Women's Rights Project to work toward the elimination of gender-based discrimination.

Lawyers associated with the American Civil Liberties Union presented the appeal in Reed v. Reed, 404 U.S. 71 (1971), participated as counsel for the appellants and later as amicus curiae in Frontiero v. Richardson, 411 U.S. 677 (1973), represented the appellant in Kahn v. Shevin, 416 U.S. 351 (1974), the appellees in Edwards v. Healy, 421 U.S. 772 (1975), Weinberger v. Wiesenfeld, 420 U.S. 636 (1975), and Califano v. Goldfarb, 430 U.S. 199 (1977), and the petitioners in Turner v. Depart. of Employment Security, 423 U.S. 44 (1975). In addition, the ACLU has acted as amicus curiae in this Court in several other gender discrimination and women's rights

cases, including most recently Orr v. Orr, ____ U.S. ____, 47 U.S.L.W. 4224 (Mar. 5, 1979) and Califano v. Westcott, No. 78-689 (U.S. Mar. 14, 1979).

THE STATUTE INVOLVED

42 U.S.C. §1985(3) provides:

(3) If two or more persons in any State or Territory conspire or go in disguise on the highway or on the premises of another, for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws; or for the purpose of preventing or hindering the constituted authorities of any State or Territory from giving or securing to all persons within such State or Territory the equal protection of the laws; or if two or more persons conspire to prevent by force, intimidation, or threat, any citizen who is lawfully entitled to vote, from giving his support or advocacy in a legal manner, toward or in favor of the election of any lawfully qualified person as an elector for President or Vice President, or as a Member of Congress of the United States; or to injure any citizen in person or property on account of such support or advocacy; in any case of conspiracy set forth in this section, if one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages, occasioned by such injury or deprivation, against by any one or more of the conspirators.

Statement of the Case

John Novotny, the respondent, began work with Great American Federal Savings and Loan Association ("GAF") in 1950 as a clerk, rising through the ranks to become an officer and member of the Board of Directors.[1/] He alleges that during the course of his employment the individual petitioners herein deliberately embarked upon a course of conduct which denied women employees the same opportunities for promotion and advancement as men.

Novotny complained of this conduct to the Board of Directors. Subsequently, he lost his position on the Board and was terminated from his employment. Novotny alleges that the individual petitioners

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1/ The facts stated herein are based on the complaint, Appendix A to Brief for Petitioners at 1-7.

conspired to perpetuate their discriminatory employment practices and to terminate his employment in retaliation for his support of equal employment opportunities for women.

Novotny brought suit in the United States District Court for the Western District of Pennsylvania, alleging a violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e, et seq., and a conspiracy among the individual petitioners in violation of 42 U.S.C. §1985(3). The District Court dismissed Novotny's claims, holding that the petitioners could not conspire among themselves because they were employees of a single corporation. The Court also dismissed the Title VII claim.

In a unanimous decision, the Third Circuit, en banc, reversed and remanded the district court's dismissal of both the

§1985(3) and the Title VII claims. The Third Circuit held, inter alia, that individuals who are directors and officers of a corporation can form a conspiracy in violation of §1985(3), that §1985(3) protects against conspiracies motivated by discriminatory animus against women, that Title VII is not an exclusive remedy so as to preclude a cause of action grounded on such a conspiracy, and that the commerce clause provides an adequate source of congressional power for the application of §1985(3) to protect rights established under Title VII.

SUMMARY OF ARGUMENT

All the elements of a §1985(3) cause of action set forth by this Court in Griffin v. Breckenridge, 403 U.S. 88 (1971), are met in this case. Petitioners acted in concert to deprive women of their right to equal employment opportunity. Pursuant to their conspiracy, they fired respondent Novotny for his efforts to ensure realization of those rights.

I

Individual officers and directors of a corporation must be held responsible for their concerted activities which violate the civil rights of others. To regard these individual natural persons as a single "person" is a legal fiction which is wholly inappropriate in the context of a civil rights conspiracy. Precedents in antitrust law which indicate

that officers and directors of a corporation cannot legally conspire among themselves are inapplicable to civil rights cases because antitrust laws and civil rights laws are based upon totally different policy considerations. Antitrust laws protect business and property rights; civil rights laws protect uniquely personal rights. Antitrust violations, if they are committed, may be the result of overzealous activity in the interest of the business entity. Motivation to harm others is not required for a civil antitrust conspiracy in violation of §1 of the Sherman Act. Civil rights violations can never be in the interest of any business entity. Section 1985(3) requires class based "invidiously discriminatory animus," a form of motivation unique to natural persons. The civil rights depri-

vation in the instant case occurred entirely within the business entity, thus making the fiction of a single indivisible entity particularly inappropriate here.

II

Section 1985(3) enforces rights to equal privileges and immunities under the laws and the equal protection of the laws, including acts of Congress. Although the right to be free from sex discrimination in private employment was not firmly established until enactment of Title VII in 1964, its enforcement by §1985(3) is not precluded. This Court has held that 18 U.S.C. §241, the criminal analogue to §1985(3), also enacted in 1871, is available to enforce Title II rights which, like Title VII rights, were established by the Civil Rights Act of 1964. United States v. Johnson, 390 U.S. 563 (1968).

Section 1985(3), which provides a civil remedy, should be construed at least as broadly as its criminal analogue.

The enforcement mechanisms provided by Title VII as remedies for employment discrimination are not exclusive. Alexander v. Gardner-Denver, 415 U.S. 36 (1974). Congress, repeatedly rejecting exclusive enforcement amendments to Title VII, has emphatically demonstrated its intention to expand the remedies for employment discrimination. To deny §1985(3) relief for sex discrimination while allowing it for other discrimination, encourages sex discrimination by permitting individuals to conspire to deprive women of equal employment opportunities without liability.

Petitioners here acted in concert to deprive women of their Title VII rights.

The conspiracy comes within the class-based animus limitation on §1985(3) actions set forth in Griffin v. Breckenridge, 403 U.S. 88 (1971). Although Griffin left open whether other than racial bias would be cognizable, this Court has consistently held unconstitutional state statutes denying equality to women, noting their foundation in a deeply rooted and invidiously discriminatory class-based prejudice. Orr v. Orr, decided this Term, invalidated a gender-based discriminatory alimony law because it perpetuated stereotypical notions of women's proper place. ___ U.S. ___, 47 U.S.L.W. 4224, 4228 (March 5, 1979). Section 1985(3) is not to limited race, but protects "any person or class of persons." Women, like blacks, have been consistently victimized by pervasive

class-based discrimination. Concerted action, motivated by an invidiously discriminatory animus toward women and undertaken to deprive them of federally guaranteed rights, should be actionable under §1985(3).

III

The correct analysis for determining if the commerce clause provides a source of congressional power for 42 U.S.C. §1985(3) is set forth by the Court in Griffin v. Breckenridge, 403 U.S. 88 (1971), and in cases specifically relied upon therein. In each of these cases, the Court determined that the right in question was a federal right, that it was properly grounded in the Constitution, and that the constitutional basis of the substantive right also served as the underpinning for the conspiracy statute

to protect against deprivation of that right. Thus the commerce clause, which underlies a Title VII right to be free from employment discrimination, also provides the power for Congress to prohibit a conspiracy to violate that right.

That the 1871 Congress may not have specifically identified the commerce clause as a basis of its power to enact a civil conspiracy statute is irrelevant. The presence of an adequate source of power in the Constitution, not Congress' express reliance, determines the constitutionality of §1985(3).

In this case, §1985(3) is being applied as a remedial statute to protect against violations of substantive rights established by Title VII. There is thus no merit to the assertion that §1985(3) must incorporate "affecting commerce"

standards to be grounded in the commerce clause, since that is essentially a claim that the statute creates substantive rights and must therefore incorporate substantive standards. Like other federal conspiracy statutes, §1985(3) finds its constitutional basis in the same source which empowered Congress to create the substantive right it protects.

Federal conspiracy statutes have been held to protect federal rights grounded in the commerce clause, such as rights created by Title II of the Civil Rights Act of 1964 and the right to travel. Rights under Title VII, a federal statute passed pursuant to the commerce clause, are similarly within the reach of the conspiracy prohibition of §1985(3).

IV

The question whether a conspiracy to violate Title VII rights can be based on the Thirteenth Amendment was not resolved below and should be deferred. If this Court should nonetheless consider the issue, recent decisions indicate that Thirteenth Amendment protection is no longer limited to persons whose ancestors have been slaves, and should extend to protect individuals against sex-based animus.

ARGUMENT

INTRODUCTORY STATEMENT

In this case, respondent Novotny seeks relief under 42 U.S.C. §1985(3) for his wrongful discharge from the Great American Federal Savings and Loan Association ("GAF"). The facts of this case fully satisfy the four essential elements of §1985(3) set forth by this Court in Griffin v. Breckenridge, 403 U.S. 88, 102-103 (1971). In his complaint, Novotny alleged that directors and employees of GAF:

(1) conspired,

(2) for the purpose of depriving women of their Title VII right to equal opportunity in private employment.

(3) In furtherence of the object of the conspiracy they discharged Novotny because of his advocacy of equal employment rights for

women, and

(4) injured him as a direct result of their actions.

The Court below held, without dissent, that respondent Novotny had properly alleged a §1985(3) cause of action. Novotny v. Great American Federal Savings & Loan Association, 584 F.2d 1235 (3d Cir. 1978) (en banc). In order to affirm the decision of the Third Circuit, this Court must decide certain statutory and constitutional questions explicitly left open in Griffin. However, amici think it important to emphasize the issues this case does not raise and which this Court need not resolve.

First, the Griffin Court, concerned lest §1985(3) be interpreted as a general federal tort law, construed §1985(3) to be limited to those conspiracies motivated by a "racial

or perhaps otherwise class-based" animus. 403 U.S. at 102 (emphasis added). The specific kinds of class-based animus other than race which would meet this requirement have not been determined by this Court. However, in order to affirm the decision below this Court need not decide whether "otherwise class-based discriminatory animus" extends to classes other than those based on gender.

Second, in order to hold that §1985(3), which protects persons from deprivations of "equal protection of the laws, or of equal privileges and immunities under the laws," extends to equal employment rights established by Title VII, this Court need not decide whether §1985(3) encompasses any other statutory or constitutional rights. Nor need this Court decide whether §1985(3) itself provides any substantive rights.

Third, in order to uphold the ruling below that application of §1985(3) to the facts of this case is constitutional by virtue of the commerce clause, this Court need not reach the constitutional questions involving the Thirteenth or Fourteenth Amendments.

I.

THE THIRD CIRCUIT CORRECTLY HELD THAT THE OFFICERS AND DIRECTORS OF A SINGLE CORPORATION MAY FORM A CONSPIRACY WITHIN THE MEANING OF 42 U.S.C. §1985(3).

A. The Single Entity Theory Is Inappropriate in the Context of Civil Rights Violations.

Respondent Novotny alleged in his complaint that the petitioners, various individually named officers and directors of the Great American Federal Savings and Loan Association ("GAF"), conspired to deprive women employees of GAF of their civil rights and that when he repeatedly protested these discriminatory practices the petitioners conspired to and did terminate his employment. Petitioners have argued below, and to this Court, that the conspiracy allegation fails to state a claim. They contend that officers and directors of a single corporation cannot be regarded as separate "persons" for the

purposes of forming a conspiracy to deprive an individual of a civil right. Rather, petitioners argue that corporate officials rank as a single legal actor -- the corporation -- whenever noncriminal liability is at stake. To support their position, petitioners indiscriminately lump together legislation designed to regulate the behavior of economic units and legislation directed to the accountability of private actors for effecting civil rights deprivations.

The Third Circuit, en banc and without dissent, rejected this argument and held that the individually named officers and directors were each "persons" capable of engaging in a conspiracy within the meaning of 42 U.S.C. §1985(3). Novotny v. Great American Savings & Loan Ass'n, 584 F.2d 1235 (3d Cir. 1978). The Court noted that Plaintiff

named individual officers and directors, not the corporation itself, as the asserted conspirators. Id. at 1258. On this basis, the Third Circuit distinguished cases in other Circuits, which have held that officers and directors are incapable (with certain exceptions) of conspiring with their corporation employer in violation of §1985(3). See, e.g., Dombrowski v. Dowling, 459 F.2d 190 (7th Cir. 1972). However, to the extent that the decision below conflicts with Dombrowski, amici support the Third Circuit position. Amici respectfully sumbit that a single entity rule, necessarily founded upon policy and precedent relevant to the competitive behavior of business enterprises, is inappropriate in the unique arena of civil rights enforcement.

B. The Law Prohibiting Antitrust Conspiracies and the Law Prohibiting Civil Rights Conspiracies are Based Upon Totally Different Policy Considerations.

Petitioners rely on Nelson Radio & Supply Co. v. Motorola, 200 F.2d 911 (5th Cir. 1952), cert. denied 345 U.S. 925 (1953), an antitrust case in which the plaintiff alleged that Motorola had conspired with certain of its officers, employees and agents, in violation of §1 of the Sherman Act. The court, rejecting plaintiff's conspiracy claim on the rationale that a corporation, which acts only through its officers, directors, and agents is incapable of conspiring through them with itself, departed from earlier cases which had arrived at the contrary result. See, e.g., Egan v. United States, 137 F.2d 369 (8th Cir.), cert. denied, 320 U.S. 788 (1943)(criminal); White Bear Theatre Corp.

v. State Theatre Corp., 129 F.2d 600 (8th Cir. 1942)(antitrust); Mininsohn v. United States, 101 F.2d 477 (3d Cir. 1939)(criminal); Patterson v. United States, 222 F. 599 (6th Cir.), cert. denied, 238 U.S. 635 (1915) (antitrust); Schoedler v. Motometer Gauge & Equip. Corp., 134 Ohio St. 78, 15 N.E. 2d 958 (1938)(tort). However, the continued vitality of the general rule that officers and directors of a single corporation are legally capable of engaging in a criminal conspiracy is not questioned. See, e.g., Alamo Fence Company of Houston v. United States 240 F.2d 179 (5th Cir. 1957); United States v. Consolidated Coal Co. 424 F. Supp. 577 (S.D. Ohio 1976), Brief of Petitioner at pp. 11-16. The issue presented here, therefore, is whether civil rights conspiracies such as the one alleged by respondent should be governed by the policy considerations

relevant in antitrust contexts, or by considerations uniquely appropriate to deprivations of an individual's rights to non-discriminatory treatment.

Policies underlying antitrust conspiracy decisions are different from and inapplicable to civil rights conspiracy cases such as the one at bar. Antitrust is entirely a commercially oriented branch of law.

Section 4 of the Clayton Act creates a cause of action for injuries to "business or property by reason of anything forbidden in the antitrust laws...." (emphasis added) (§4 Clayton Act, 15 U.S.C. §15). Courts have consistently denied standing under §4 to plaintiffs who have alleged injury to their civil rights, see, e.g., N.A.A.C.P. v. New York Clearing House Ass'n, 431 F. Supp. 405 (S.D. N.Y. 1977), or to their personal

rights, see, e.g., Hawaii v. Standard Oil Co., 405 U.S. 251 (1972); Reibert v. Atlantic Richfield Co., 471 F.2d 727 (10th Cir. 1972), cert. denied, 411 U.S. 938 (1973); Jeffrey v. Southwestern Bell, 518 F.2d 1129 (5th Cir. 1975); Reiter v. Sonotone Corp., 579 F.2d 1077 (8th Cir. 1978), cert. granted, 47 U.S.L.W. 3463, Jan. 9, 1979 (U.S. No. 78-690).

Officers, directors and employees of a corporation are hired to strengthen the corporation's competitive position in the marketplace. If, in the performance of their official duties to advance the corporation's business interests, such officers violate antitrust laws, that activity presumably results from the overzealous pursuit of the corporation's legitimate business interests. The distinction between vigorous but permissible competitive behavior and

overly competitive illegal conduct can be unclear. Note, Intracorporate Conspiracies under 42 U.S.C. §1985(c), 92 Harv. L. Rev. 470, 481-82 (1978). But in all cases, a violation retains its character as a corporate, not an individual act, undertaken to promote corporate interests.

Section 1 of the Sherman Act was not intended to regulate activity within a business entity, but to prevent restraints of trade through the concerted activities of independent business entities. Unlike §1985(3), civil actions brought under §1 of the Sherman Act require no allegation of motivation. However, to the extent that a motivating force can be identified as leading to an antitrust violation, that motive would be the enhancement of the corporation's business position.

Section 1985(3), however, was intended to regulate personal rather than economic behavior. It was intended to redress harm that transcends commercial interests. Discrimination against an individual because of her race, sex, religion or national origin stifles her urge to contribute to society, depresses her concept of her own worth, and leads her to accept a second class self image. The damage such discrimination occasions not only to the immediate victims, but to the larger community, is enormous.

While there may be sound reasons, grounded in the need to permit a meaningful intracorporate decision-making process pertaining to economic issues, to recognize the fiction of the corporation as a unitary

entity in the antitrust context,[2] no such rationale can be proffered in the context of §1985(3). As the Third Circuit said in the instant case:

> The considerations which shape this antitrust doctrine, rooted in the tension between the policy of preserving and fostering competition and the interest in not intermeddling unnecessarily in the internal entrepreneurial decisions of companies, do not lie parallel to the balance of concerns embodied in §1985(3). For example, while almost any decision by a corporation may have an effect on competitors, and thereby come within the potential purview of the the antitrust law, cf. Chicago Board of Trade v. United States, 246 U.S. 231, 238, 38 S.Ct. 242, 62 L.Ed. 683 (1918), only a limited number of de-

2/ Government enforcement agencies might dispute this conclusion even as applied in antitrust cases. See, e.g., Lorain Journal Co. v. United States, 342 U.S. 143 (1951), in which the government alleged a conspiracy by a corporation and its officials under §1 of the Sherman Act. The Court found an attempt to monopolize under §2 and did not rule on the §1 claim.

> cisions will impact on 'equal protection' and 'equal privileges and immunities.' Conversely, while courts have interpreted economic efficiencies and pro-competitive effects to constitute justifications for certain restraints of trade we discern no indication that similar defenses would protect a conjuration to deprive a minority of equal rights.
> 584 F.2d at 1258, n. 121.

Unlike close questions under antitrust laws, anti-civil rights activities cannot be said to benefit the corporation in whose name they are perpetrated. On the contrary, such activities detract from the optimal utilization of human resources. For the corporation and the nation, they are tragic, wasteful endeavors.

Activities violative of the antitrust laws are at least undertaken to, and may in fact, advance the goal of increased corporate profits. But denial of equal opportunities to women cannot be justified under any

circumstance as furthering any cognizable corporate goal. No corporate interest is advanced if a necessary function is performed by a man instead of a woman. Furthermore, the distinction between legal and illegal behavior under §1985(3) is clear. There is no continuum of behavior which may subtly shift from permissible to impermissible. Finally, in contrast to antitrust conspiracies, the element of motive is critical to a violation of §1985(3). "Class based, invidiously discriminatory animus" grows out of the personal prejudice and bigotry of the decision makers. Such motivations are uniquely attributable to natural persons.

C. Corporate Directors and Officers Should Not Be Shielded from Liability for their Concerted Activities to Violate the Civil Rights of their Employees.

An individual who becomes a director, officer or agent of a corporation does not thereby lose his or her identity as a natural person. Although a corporate "person" surely acts only through its officers and directors, the officers and directors remain natural persons who can act unilaterally or in concert with other natural persons. Individual officials of a municipal corporation, acting nominally on behalf of the city, have been found to have conspired within the meaning of §1985(3), see, e.g., Glasson v. City of Louisville, 518 F.2d 899 (6th Cir.), cert. denied, 423 U.S. 930 (1975), and no sound reason exists in the present context to insulate the individuals here from responsibility

for their illegal activities.[3/]

3/ Contrary to the petitioners' implication (Brief of Petitioner at 13), respondeat superior does not relieve corporate officials of individual liability. Officers, directors and agents remain liable for the wrongs they commit as agents of the corporation. See, e.g., 3A W. Fletcher, Cyclopedia of the Law of Private Corporations §1135 (Rev. ed. 1975); Restatement (Second) of Agency §343 (1958); Tillman v. Wheaton-Haven Recreation Ass'n, Inc., 517 F.2d 1141, 1142-46 (4th Cir. 1975). Respondeat superior provides the injured party a remedy against the enterprise, generally a more secure source of funds, in addition to the remedy available against the employee-wrongdoer. In short, invocation of respondeat superior in this context is perverse. Petitioners would turn a rule intended to give the victim recourse to business entities as well as individuals into a rule that would immunize both the corporation and the flesh and blood agent.

Dombrowski and Cole v. University of Hartford, 391 F. Supp. 888 (D. Conn. 1975) raise the theoretical possibility of a corporation organized specifically to deprive persons of protected civil rights and conclude that such a group would be denied the protection conferred by corporate status.[4/] In practice, however, the risk

4/ Petitioners improperly argue (Brief of Petitioner at 17) that the Third Circuit has in essence pierced GAF's "corporate veil," and that the corporate veil can only be pierced if the corporation itself is a sham or organized for unlawful purposes. Piercing the corporate veil is inapplicable in this context. The genesis of the "piercing" analysis is the established rule that a corporation is an entity separate from its shareholders. In the ordinary case, this separation is recognized and a corporation cannot be held liable for the obligations of its shareholders, and a shareholder cannot be held liable for the obligations of the corporation. The doctrine simply has nothing to do with the question of whether officers, directors, or employees of a corporation can be treated as individuals capable of entering into a conspiracy in violation of §1985.

is real that an existing corporate entity, formed for and pursuing legitimate business purposes, may be abused by its officers and directors to shield their discriminatory conduct.

The conspiracy alleged in this case is distinguishable from decisions upon which petitioners rely in that all the parties were employed by GAF. Novotny, no less than the petitioners, was an officer of the corporation. Many of the women who were victims of the concerted discriminatory policies of the petitioners were also agents and employees of that same corporate "person". Thus, unlike Nelson Radio, Dombrowski, [5]

[5] In Dombrowski, the Seventh Circuit concluded that "if the challenged conduct is essentially a single act of discrimination by a single business entity... the act itself will normally not constitute the conspiracy contemplated by this statute." (emphasis added) 459 F.2d at 196. In Rackin
[Footnote continued on next page]

and Girard v. 94th Street and Fifth Avenue Corp.,530 F.2d 66 (2d Cir.), cert denied, 425 U.S. 974 (1976), where the alleged victims were "outside" third parties such as a customer and prospective tenants, the injury resulting from the conduct in issue was inflicted on the corporation's own employees. The challenge here is not from without but from within. Whatever shield may protect the corporate identity of the petitioners from external assault should not

[Footnote continued]

v. University of Pennsylvania, 386 F. Supp. 992 (E.D. Pa. 1974), the court held that plaintiffs had stated a claim for a violation of §1985(3) in view of allegations defendants had committed many continuing acts of discrimination. Id. at 1005-06. Similarly, in the instant case respondent has alleged a continuing course of discriminatory conduct, over an eight year period, as detailed by the Third Circuit at 584 F.2d at 1237 n. 1, which culminated with his termination. Thus, this case falls within an announced exception to the general rule in Dombrowski.

protect them from employee claims arising from within the structure itself.

Immunity should not be extended to conspiracies to deprive persons of their civil rights which, although hatched in the corporate boardroom or executive suite, do not and cannot redound to the benefit of the corporation in whose name they are conveniently cloaked. To maintain the fiction that the individual petitioners are a single indivisible corporate entity would result in a distortion of reality, and lead to the evasion of a just responsibility. It would exalt a legal form over the common sense fact. Thus, amici urge that this Court give effect to the rule recognizing that individual officers and directors of a single corporation are legally capable of forming a conspiracy in violation of 42 U.S.C. §1985(3).

II.

SECTION 1985(3) APPLIES TO CONSPIRACIES TO DEPRIVE WOMEN OF EQUAL EMPLOYMENT OPPORTUNITIES.

A. Rights Established by Title VII Are Protected by Section 1985(3).

Respondent seeks to redress under §1985(3) his discharge from GAF for his efforts to vindicate the right of women to equal opportunity in private employment -- a right established by Congress in Title VII of the Civil Rights Act of 1964. Accordingly, this case raises two questions not before the Court in Griffin: First, does §1985(3) prohibit conspiratorial interference with federal statutory rights; and second, does §1985(3) provide a remedy for the violation of rights established after its enactment.[6/] Nothing on the face

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6/ Specifically, this Court need only decide whether claims for violations of Title VII alleging animus are cognizable. It need not

[Footnote continued on next page]

of §1985(3), in its legislative history, or in its application by this Court requires or even suggests that it is not available to remedy violations of Title VII rights.[7/]

1. Section 1985(3) applies to federal statutory rights.

Petitioners' contention that the statute provides a remedy only for violations of fundamental constitutional rights and not for the infringement of rights created by federal statute (Brief of Petitioner at 25-34) flies in the face of the plain meaning of the statutory language. On its face,

[Footnote continued]
decide whether violations of Title VII resulting from a disparate impact on the protected class are actionable or whether §1985(3) provides a remedy for rights created by state law.

7/ Title VII likewise does not preclude the remedy. (See § C infra.)

§1985(3) applies generally to deprivations of "equal protection of the laws, or equal privileges and immunities under the laws." "Laws" plainly include acts of Congress.

Finding no basis for their argument in the language of §1985(3), petitioners attempt to suggest that this Court's rulings in Griffin v. Breckenridge and United States v. Price, 383 U.S. 787 (1966) limit the application of §1985(3) to constitutional rights. That argument is similarly without merit. Although the Griffin Court construed §1985(3) to apply to certain fundamental constitutional rights, it did not exclude statutory rights from the section's coverage.[8/]

8/ The Griffin petitioners apparently did not even allege infringement of statutory rights. 403 U.S. at 90.

In Price, the Court construed the scope of 18 U.S.C. §241, characterized in Griffin as "the closest criminal analogue to §1985(3)." 403 U.S. at 98. Section 241 reaches conspiracies to interfere with rights "secured . . . by the Constitution or laws of the United States . . . ." There, the lower court had dismissed indictments brought under §241, holding that the statute did not cover criminal conspiracies to violate Fourteenth Amendment rights. Reversing, this Court held that the statute extended to Fourteenth Amendment rights. It did not hold, as petitioners would suggest, that the statute was limited to constitutional rights. In fact, this Court had previously held that the predecessor of §241 prohibited criminal conspiracies to abridge federal statutory rights under the Homestead Act. United States v. Waddell, 112 U.S. 76 (1884).

2. Section 1985(3) provides a civil remedy for the violation of rights established after its enactment.

Section 1985(3) is not limited by its language to those rights firmly established at the time it was enacted in 1871. Justice Holmes, writing for the majority in United States v. Mosley, 238 U.S. 383 (1915), addressed the scope of the civil rights acts in changing times:

> . . .we cannot allow the past so far to affect the present as to deprive citizens of the United States of the protection which, on its face, §19 [now §241] most reasonably affords. 238 U.S. at 388.[9]

In United States v. Johnson, 390 U.S. 563 (1968), this Court held that §241, originally enacted in 1871, was available

[9] Mosley held §19 [now §241] applicable to non-violent conspiracies contrary to the suggestion of Amicus Curiae Equal Employment Advisory Council. (cf. Brief of Amicus Curiae at 8-9).

to enforce the "right to service in a restaurant," a right which existed "at least by virtue of the 1964 Act." Id. at 565-66. The Johnson indictment "did not allege injury to any rights other than those established by Title II of the Civil Rights Act of 1964." Id. at 568 n. 2 (dissenting opinion).

It would defy settled rules of statutory construction to construe a law establishing a civil remedy more narrowly than one imposing criminal liability. If §241 applies to later established federal statutory rights, §1985(3) is, a fortiori, applicable to such rights.

B. Title VII and §1985(3) Provide Complementary Remedies For Employment Discrimination.

1. Title VII's remedies for sex discrimination in private employment are not exclusive.

The clear thrust of this Court's decisions in Alexander v. Gardner-Denver, 415 U.S. 36 (1974), and Johnson v. Railway Express Agency, 421 U.S. 454 (1975), is that Title VII does not supplant or interfere in any way with rights or remedies created by other statutes.[10] The existence of multiple avenues for the redress of injuries arising from discrimination in employment is integral to Title VII. For example, initiation of a proceeding in one forum does not preclude liability in another.[11]

10/ This Court has also refused to find that the provisions of the 1964 and 1968 Civil Rights Acts prohibiting private discrimination in public accomodations and housing preclude a remedy under 42 U.S.C. §1982, derived from the Civil Rights Act of 1866. Sullivan v. Little Hunting Park, 396 U.S. 229, 237-38 (1969); Jones v. Mayer Co., 392 U.S. 409, 413-17 (1968)..

11/ Section 708 specifically preserves the efficacy of state and local laws regulating employment discrimination. 42 U.S.C. §2000e-7.

Writing for a unanimous Court in Alexander v. Gardner-Denver, Justice Powell observed that in enacting the Civil Rights Act of 1964, which included Title VII, "Congress indicated that it had considered the policy against discrimination to be of the 'highest priority'" and that "legislative enactments in this area have long evinced a general intent to accord parallel or overlapping remedies against discrimination." 415 U.S. at 47.

The following year, in Johnson v. Railway Express Agency, this Court unanimously reaffirmed that the "aggrieved individual . . . is not limited to Title VII in his search for relief."[12/] 421 U.S. at 459.

12/ Brown v. General Services Administration, 425 U.S. 820 (1976) holding Title VII's §717 an exclusive remedy for employment discrimination by the federal government, is not
[Footnote continued on next page]

That case demonstrates that the full range of statutory remedies is essential to overcome deeply-rooted discriminatory practices and habits. The purpose of Title VII would be undermined if that statute were held to foreclose pursuit of other remedies.[13/]

[Footnote continued]
applicable to this case. Distinguishing Alexander and Johnson, the majority took great care to confine its holding to federal employment. Id. at 833. Johnson, which held Title VII remedies not exclusive in the private sector, was also a race discrimination case. Petitioners fail in their attempt to read Brown to overrule by implication the unequivocal holding in Johnson.

13/ Alexander held cases precluding suit under the Labor Management Relations Act after an individual's election of negotiation or arbitration inapposite. Deference to the primacy of conciliatory mechanisms in those cases serves the purpose the LMRA was designed to serve. Unlike Title VII, the purpose of the LMRA is "industrial peace." 415 U.S. at 46. This Court should firmly reject petitioner's invitation to retreat from that well-established precedent.

Congress clearly intended for Title VII to be a non-exclusive remedy for discrimination by private employers. This Court has noted Congress' repeated rejection of proposed amendments to Title VII, which would have made Title VII remedies exclusive. Alexander v. Gardner-Denver, 415 U.S. at 48 n. 9; Johnson v. Railway Express, 421 U.S. at 459. As the House Report accompanying the 1972 Equal Employment Opportunity Enforcement Act, which amended Title VII, makes clear: "Title VII was envisioned as an independent statutory authority meant to provide an aggrieved individual with an additional remedy to redress employment discrimination." H.R. Rep. No. 238, 92nd Cong.; 2d Sess. 18019 (1972). (Emphasis supplied.) Senator Williams, one of the original sponsors of the 1972 amendments, explained that the

1972 legislation was "premised on the continued existence and vitality of other remedies for employment discrimination." 118 Cong. Rec. 3371 (1972).

Section 1985(3) of the 1871 Civil Rights Act is among those other remedies. In 1972 the Senate rejected an amendment to the Equal Employment Opportunity Enforcement Act that would have made Title VII and the Equal Pay Act the exclusive means of redressing discrimination in employment. 118 Cong. Rec. 3371-72 (1972). Senate defeat of the futile attempt to confine the remedies available to individuals aggrieved by employment discrimination demonstrates that Title VII and the 19th century Civil Rights Acts were to continue side by side in the nation's commitment to equal opportunity. To exclude §1985(3) from the array of independent reme-

dies available to persons injured by discriminatory employment practices would be to contradict explicit indications of congressional intent.

Consistent with the congressional mandate that Title VII expand the remedies available for employment discrimination, the Sixth Circuit has ruled that §1985(3) is available to remedy private employemnt discrimination on the basis of religion, which, like sex discrimination, was not expressly prohibited in private employment before enactment of Title VII. Marlowe v. Fisher Body, 489 F.2d 1057 (6th Cir. 1973).

Ignoring Marlowe, petitioners rely on Doski v. M. Goldseker Co., 539 F.2d 1326 (4th Cir. 1976), for their contention that §1985(3) should not be interpreted to remedy sex discrimination in private employment.

The Fourth Circuit, although acknowledging that this Court "made clear [in Alexander v. Gardner-Denver Co., and Johnson v. Railway Express Agency] that Title VII was not intended to preempt other remedies," restricted this clear and controlling precedent to rights "preexisting or independent" of Title VII. Id. at 1334. Finding "no federal right [to be free from sex discrimination in private employment] prior to the enactment of Title VII," and mistakenly reasoning that Congress "intended the procedures under [Title VII] to be the exclusive mechanism for effectuating rights created by the statute," the court held that §1985(3) is not an available mechanism to enforce rights created by Title VII. Id.

The misleading distinction between pre-existing rights and pre-existing remedies

was never considered by Congress when it unequivocally provided that the enforcement mechanisms of Title VII not be exclusive.[14/] Confining victims of sex discrimination to Title VII remedies while permitting victims of other forms of discrimination to pursue all available remedies not only thwarts the clear congressional purpose to expand the remedies for employment discrimination but also encourages sex discrimination by allowing individuals to act in concert to deprive women of equal employment opportunities without liability.

14/ That §1985(3) provides a remedy for violations of rights deriving directly from the Constitution or established by other statutes does not mean that it is devoid of substantive elements. Whether §1985(3) creates a substantive right to be free from employment discrimination is not before this Court. In the context of this case, however, §1985(3), together with Title VII, guarantees the right to be protected against individuals who, motivated by a gender-based animus, conspire to discriminate against women in private employment. (See Section II(B)(2), infra).

The Doski court did not address the ruling of this Court in United States v. Johnson, 390 U.S. 563 (1968) that 18 U.S.C. §241, originally enacted in 1871 and the criminal analogue to §1985(3), can be used to enforce rights established by Title II of the 1964 Act. (See Section II(A)(2), supra). Title II provides that its enforcement mechanisms "shall be the exclusive means of enforcing rights based on this subchapter," although it permits litigants to pursue all available remedies to enforce other rights.[15/] 42 U.S.C. 2000a-6(b). The distinction drawn by the Doski court in its Title VII analysis coincides exactly with the statutory language of Title II. In contrast to Title II, however,

15/ The dissent in Johnson expressed concern only about the explicit exclusivity of Title II. 390 U.S. at 568- 69.

Title VII does not provide that its remedies are the exclusive means of enforcing the rights it establishes. The Johnson Court refused to construe the explicit language of Title II to constrict enforcement of Title II rights in that case.[16/] Therefore, this Court should not curtail the remedies available to enforce Title VII rights here.

2. Section 1985(3) provides a necessary remedy in this case.

The thrust of Title VII is to protect against practices of companies and unions, not against acts of individuals. Here, Novotny claims redress for the concerted actions of his co-directors and fellow

16/ Petitioners cannot escape liability under §1985(3) by analogizing from the Johnson dictum that proprietors who believed their establishments were not covered by Title II could not be held criminally liable for violations of the title until they had had an opportunity to litigate its applicability. 390 U.S. at 565. Petitioners here clearly knew, or should have known, that their employment practices were covered by Title VII.

employees to deprive women of equal employment opportunities. Unlike Title VII, §1985(3) clearly provides for full compensatory and punitive damages, which may be appropriate in this case.

Arguing against the proposed "exclusive enforcement" amendment prior to its second rejection in 1972, Senator Jacob Javits, co-author of the 1972 amendments, noted the importance of the 1871 civil rights statutes in reaching third parties guilty of discrimination.

> There are other remedies, but those other remedies are not surplusage . . . The methodology in Title VII is a unitary thing, it pits the individual against the employer; it does not affect third parties. There have been cases in which third parties have been guilty of bringing about the discrimination. 118 Cong. Rec. 3961-62 (1972).

The same view was persuasively presented by Senator Williams:

> The law against employment discrimination did not begin with Title VII and the EEOC, nor is it intended to end with it. The right of individuals to bring suits in federal courts to redress individual acts of discrimination, including employment discrimination, was first provided by the Civil Rights Acts of 1866 and 1871 . . . .118 Cong. Rec. 3371-72 (1972).

The right to be free from concerted action by individuals to interfere with rights established in Title VII, was one which Congress, in rejecting an exclusive enforcement amendment to Title VII, clearly sought to ensure. Section 1985(3) is indispensible to the full enjoyment of that right.

C. The Requisite Class-Based Animus Is Present In This Case.

To avoid "[t]he constitutional shoals that would lie in the path of interpreting §1985(3) as a general federal tort law. . . "

this Court in Griffin v. Breckenridge, construed

> [t]he language requiring intent to deprive of equal protection, or equal privileges and immunities . . . [to mean] that there must be some racial, or perhaps otherwise class-based, invidiously discriminatory animus behind the conspirators' action. [footnote omitted]. The conspiracy, in other words, must aim at a deprivation of the equal enjoyment of rights secured by the law to all. [footnote omitted]. 403 U.S. 88, 102 (1971). [emphasis in original].

Griffin left open "whether a conspiracy motivated by invidiously discriminatory intent other than racial bias would be actionable under . . . §1985(3)." Id. at n. 9. The question here is whether a conspiracy motivated by sex bias satisfies the animus requirement. This Court need not decide whether any other discriminatory animus would be actionable.

Since Griffin, no court has ruled that gender based discrimination is outside the scope of §1985(3).[17/] Indeed, petitioners do not appear to contest that a conspiracy motivated by sex bias is actionable. Prior decisions of this Court and the language and legislative history of §1985(3) compel the conclusion that discrimination against women

17/ In addition to the Third Circuit, the Eighth Circuit has held gender motivated conspiracies actionable under §1985(3). Conroy v. Conroy, 575 F.2d 175 (8th Cir. 1978). Two circuits, in refusing to find class-based animus in the cases before them, have indicated that conspiracies motivated by sex bias would be cognizable under §1985(3). Meiners v. Moriarity, 563 F.2d 343, 348 (7th Cir. 1977); Murphy v. Mount Carmel High School, 543 F.2d 1189 (7th Cir. 1976); McClellan v. Mississippi Power and Light Co., 545 F.2d 919, 932 n. 78 (5th Cir. 1977) (en banc). In fact, most §1985 claims dismissed on class-based animus grounds failed even to allege or raise the animus issue. E.g., Dacey v. Dorsey, 568 F.2d 275 (2d Cir. 1978); Jennings v. Shuman, 567 F.2d 1213 (3d Cir. 1977); Meiners v. Moriarity, 563 F.2d 343 (7th Cir. 1977); [Footnote continued on next page]

is the type of class-based invidious discrimination the statute was designed to prohibit.

This Court's decisions make clear that discrimination based on sex is an invidious, deeply-rooted example of class-based animus. Gender-based classifications "reinforcing stereotypes about the 'proper place' of women . . ." have been repeatedly held unconstitutional. Orr v. Orr, 47 U.S.L.W. 4224, 4228 (March 5, 1979). See also, Califano v. Goldfarb, 430 U.S. 199 (1977); Stanton v. Stanton, 321 U.S. 7 (1975); Craig v. Boren, 429 U.S. 190 (1976); Frontiero v. Richardson,

[Footnote continued]
Regan v. Sullivan, 557 F.2d 300 (2d Cir. 1977); Atkins v. Lanning, 556 F.2d 485 (10th Cir. 1977); Askew v. Bloemker, 548 F.2d 673 (7th Cir. 1976); Hahn v. Sargent, 523 F.2d 461 (1st Cir. 1975), cert. denied, 425 U.S. 904 (1976); Hughes v. Ranger Fuel Corp., 467 F.2d 6 (4th Cir. 1972).

411 U.S. 677 (1973); Reed v. Reed, 404 U.S. 71 (1971). Mr. Justice Blackmun, writing for the majority in Mathews v. Lucas, 427 U.S. 495, 506 (1976), observed that sex, like race, is an "obvious badge" and noted "the severity [and] pervasiveness of the historic legal and political discrimination against women. . . ." This is the very kind of class-based invidious discrimination that §1985(3) was enacted to remedy.[18/]

18/ The fact that Novotny is not a member of the class discriminated against does not bar his action. The statute itself provides that where, as the result of conspiratorial acts, "another is injured in his person or property, or deprived of having and exercising any right or privilege. . . the party so injured or deprived may have an action. . . ." (emphasis supplied). The Court below reviewed extensive legislative history revealing a congressional intent to protect not only the persons against whom the conspiratorial animus is directed but those "who by any means attract attention as [their] earnest friends . . . ." Cong. Globe, 42nd Cong., 1st Sess. (1871), App. 78 (Rep. Perry); 584 F.2d at 1244. [Footnote continued on next page]

The language of §1985(3) does not limit the statute's reach to conspiracies motivated by racial bias. Nor does the legislative history. Although the statute was passed in large part to protect the black population of the post-war South, no effort was made to limit its coverage to blacks. In contrast to the Civil Rights Acts of 1866 and 1870, which bestow upon others rights enjoyed by "white citizens," the 1871 Act, of which §1985 is a part, expressly applies to "any person." This Court has repeatedly stated that the civil rights acts, including §1985(3), should be "'accord[ed]. . . a sweep

[Footnote continued]
This Court has repeatedly held that white persons injured because of their advocacy of racial integration may seek redress under those statutes enacted to end discrimination. Sullivan v. Little Hunting Park, 396 U.S. 229, 237 (1969); Adickes v. Kress & Co., 398 U.S. 144 (1970). Similarly, men have been permitted to raise discrimination against women when they have been injured by it. Duren v. Missouri, ___ U.S. ___, 58 L. Ed.2d 579 (1979); Taylor v. Louisiana, 419 U.S. 522 (1975).

as broad as [their] language.' United States v. Price, 383 U.S. 787, 801 . . . ." Griffin v. Breckenridge, 403 U.S. at 97 (1971).

Although the legislative history on the statute's applicability to women as a class is sparse, there is no indication that Congress intended to exclude women from the protection of the act. To the contrary, Congress was informed that the law would cover women. Representative Kelley of Oregon asserted that the duty of Congress in enacting the 1871 Act was to "protect the humblest man within its limits, [to] snatch from oppression the feeblest woman or child . . . ." According to Representative Shellabarger, one of the bill's sponsors, the purpose of the law was to remedy "any violation of the right, the animus and effect of which is to strike down the citizen, to the end that he may not

enjoy equality of rights as contrasted with his and other citizens' rights . . . ." Congressional Globe, 42nd Cong., 1st Sess. 478 (1871). It is precisely for this stated purpose that respondent Novotny invokes the protection of § 1985(3).

III.

THE COMMERCE CLAUSE AUTHORIZES THE APPLICATION OF § 1985(3) TO REDRESS INJURIES FOR VIOLATIONS OF RIGHTS SECURED BY TITLE VII.

A. The Source of Congressional Power to Reach a Private Conspiracy is the Same as the Source of the Substantive Right Allegedly Infringed.

In Griffin v. Breckenridge, this Court held that § 1985(3) prohibits private conspiracies by individuals to deprive another of equal protection of the laws or equal privileges and immunities under the laws. To invoke the protection of the statute, the Court held that it is necessary "to [identify] a source of Congressional power to reach the private conspiracy alleged by the complaint. . . ." 403 U.S. at 104.

The rights infringed in Griffin -- to be free from badges and incidents of slavery, and to travel freely between states -- were found by the Court to be federal rights properly grounded in the Thirteenth Amendment and the Constitutional power to protect interstate travel. Griffin makes clear, however, that the identification of these two sources of Congressional authority does "not imply the absence of any other." 403 U.S. at 107.

The Court's analysis in Griffin demonstrates that when Congress acts pursuant to the commerce clause to create a substantive right to be free from discrimination in employment, the same source of power authorizes the prohibition of private conspiracies designed to infringe

that right. This analysis relied upon earlier constructions of 18 U.S.C. § 241, "a criminal statute of far broader phrasing [than § 1985(3)]" which "reaches wholly private conspiracies, and is constitutional." 403 U.S. at 104.

The Court first upheld the constitutionality of 18 U.S.C. § 241, then R.S. 5508, in Ex Parte Yarbrough, 110 U.S. 651 (1884). The defendants had been charged with conspiring to interfere with the right to vote in a Congressional election. This Court found that the Constitution empowered Congress to regulate the time, place and manner of Federal elections, and to enforce the Fifteenth Amendment, and held that the same sources of power authorized

application of the conspiracy statute to prohibit interference with the right to vote. Laws such as R.S. 5508, passed by Congress to protect this right "stand upon the same ground and are to be upheld for the same reasons." 110 U.S. at 662. The Congressional power to enact such laws "arises out of the . . . [fact that] the right which [the party] is about to exercise is dependent on the laws of the United States." Id.

Eight months after Yarbrough was decided, this Court confronted another challenge to the constitutionality of R.S. 5508. In United States v. Waddell, 112 U.S. 76 (1884), R.S. 5508 was invoked to reach a private conspiracy to deprive an individual of his statutory right to perfect title to land under the federal Homestead Acts, R.S. 2289-2291.

The Court found the source of Congressional power to pass the Homestead Acts to be in Article IV, Section 3 of the Constitution, which vests in Congress the power to dispose of and make all needful rules and regulations respecting the territory or other property of the United States. 112 U.S. at 79-80. Concluding that this same source provided the constitutional underpinning of the conspiracy statute, the Court reasoned:

> Whenever the acts complained of are of a character to prevent the exercise of a statutory right or throw obstruction in the way of exercising this right, and for the purpose and with intent to prevent it or to injure or oppress a person because he has exercised it, then, because it is a right asserted under the law

> of the United States and granted by that law, those acts come within the purview of the statute and of the constitutional power of Congress to make such a statute.

112 U.S. at 80 (emphasis added).

An analysis similar to Yarbrough and Waddell underlies Logan v. United States, 144 U.S. 263 (1892). At issue there was a conspiracy to injure persons in the custody of a federal marshal. Imposing a criminal sanction for interference with a federal function (supervision of federal prisoners) was held "necessary and proper" action by Congress. In Logan, the Court reviewed prior decisions dealing with the constitutionality of R.S. 5508, and reaffirmed the established principle that:

> ...every right, created by, arising under, or dependent upon the Constitution of the United States, may be protected...by such means and in such manner as Congress, in the exercise of ...the legislative powers conferred upon it by the Constitution, may in its discretion deem most eligible and best adapted to attain the object.

144 U.S. at 293.

In all the cases discussed above, the Court made the same three-step analysis. It first determined whether the right to be protected was a federal right. Then it considered the constitutional source for that right. Third, when the substantive right was found properly grounded in the Constitution, the Court held this constitutional base also served as the source of Congressional authority to protect the right in question under R.S. 5508 (§241). The Court

did not examine whether Congress had specifically intended the conspiracy statute to reach any particular fact situation. Rather, it focused on the constitutional authority for Congress to enact whatever statute created the substantive right in question.

In Griffin, this Court specifically relied on the reasoning of Yarbrough, Waddell, and Logan,[19] in upholding as constitutional the use of § 1985(3) to protect the rights allegedly infringed by petitioners. Writing for the Court,

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19/ In Re Quarles, 158 U.S. 532 (1895), also relied upon by the Court in Griffin, applied the reasoning of Logan to hold that R.S. 5508 could protect against private conspiracy the right of a citizen to inform federal law enforcement officials of a violation of federal law.

Justice Stewart first analyzed the substantive rights in question, found them to be federal rights properly grounded in the Constitution, and then held that the sources of Congressional power to reach the alleged private conspiracy were the very same sources as those of the substantive right.

The three step analysis of Yarbrough, Waddell, Logan, and Griffin, as applied to the case at bar, mandates the conclusion that the commerce clause power, which authorizes Title VII, also supports application of § 1985(3) to Petitioners' conduct. First, there is no doubt that Title VII is a federal statute creating federal rights. Second, petitioners acknowledge that Title VII is validly enacted pursuant to the commerce clause. See discussion in Brief for Petitioners

at 40,42. Thus, the first and second steps of the Court's three step analysis are conceded by petitioners. The similarity of the facts in Waddell with those of the case at bar establishes the third step in the analysis. Like David Waddell, who alleged that he was unlawfully prevented by private persons from exercising his federal statutory right to perfect title to land under the Homestead Act, John Novotny is complaining of acts of individuals which obstructed the exercise of his federal right under Title VII to oppose unlawful employment

practices.[20] Because the right asserted in each case was one created by a law of the United States validly enacted pursuant to a constitutional power of Congress, a private conspiracy to interfere with this right comes within the

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20/ Section 704(a) of Title VII, 42 U.S.C. 2000e-3(a), provides in relevant part:

> It shall be an unlawful employment practice for an employer to discriminate against any of his employees ... because he has opposed any practice made an unlawful practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter.

Novotny may also have standing under section 703 of Title VII to claim the right to a discrimination-free work environment. See Waters v. Heublein, Inc., 547 F. 2d 466 (9th Cir. 1976), cert. denied, 433 U.S. 915 (1977).

purview of the federal conspiracy statutes. The congressional power underlying the conspiracy statutes is grounded in the constitutional authority to create the substantive right. In Waddell, congressional power was based on Article IV, § 3; in the instant case, it is found in the commerce clause. Petitioners have pointed to no case which casts doubt on the constitutional power of Congress to protect individuals from the interference by private parties with rights conferred by a validly enacted federal statute.[21]

21/ Petitioners rely on Doski v. M. Goldseker Co., 539 F.2d 1326 (4th Cir. 1976) for the proposition that § 1985(3) does not cover private sex-based conspiracies to violate Title VII rights. The interpretation in Doski turns on a statutory construction of Title VII, and not on a claim of insufficient Congressional power

[Footnote continued on next page]

In the instant case, the Third Circuit correctly followed this Court's precedents, stating that "[t]he same authority which warrants the provision of such rights in the first place equally empowers Congress to provide sanctions against conspiracies to interfere with the equal enjoyment of rights under Title VII." 584 F.2d at 1255.

B. Express Congressional Reliance is not Required for a Finding that the Commerce Clause Fully Supports the Enactment of § 1985(3).

Petitioners argue that absent explicit commerce clause invocation by Congress, that base of federal authority must be ignored in determining the constitutionality of applying § 1985(3)

[Footnote continued]
to protect employment rights created by federal law. See discussion of statutory scope of § 1985(3) supra, at Section II (B)(1).

to a conspiracy to violate Title VII. This argument is without merit. This Court has never required as a condition to upholding the constitutionality of a statute that Congress state expressly the source of power relied upon. In Griffin v. Breckenridge, the Court reviewed and analyzed the legislative history of § 1985(3) to construe the scope of the statute, not to identify a constitutional basis for the enactment. For as the Court said in Woods v. Miller, 333 U.S. 138, 144 (1948), "[t]he question of the constitutionality of action taken by Congress does not depend on recitals of the power which it undertakes to exercise."

In Griffin, this Court stated unequivocally: "That § 1985(3) reaches private conspiracies to deprive others

of legal rights can, of itself, cause no doubts of its constitutionality." 403 U.S. at 104. If the 1871 Congress did not expressly rely on the commerce clause, neither did it rely on the right to travel. Nevertheless, this Court found interstate travel to be an appropriate constitutional underpinning for the conspiracy alleged in Griffin. Similarly, other constitutional provisions, such as the commerce clause, can supply the congressional power basis to reach § 1985(3) conspiracies, whether or not the 1871 Congress specifically relied

upon them.[22]

Petitioners argue that § 1985(3) cannot appropriately be used to vindicate rights protected by Congress' commerce clause powers, claiming that the statute was intended solely to remedy "violations of the fundamental rights of citizens" which had recently been extended to blacks by the Thirteenth,

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22/ Regarding the commerce clause as a source of power when Congress has expressly relied on a different constitutional provision, Justice Stevens said of the 1972 Title VII extension to cover state employers:

> In my opinion the commerce power is broad enough to support federal legislation regulating the terms and conditions of state employment and, therefore, provides the necessary support for the 1972 Amendments to Title VII, even though Congress expressly relied on §5 of the Fourteenth Amendment. (Concurring opinion, emphasis supplied.) Fitzpatrick v. Bitzer, 427 U.S. 445, 458 (1976).

Fourteenth, and Fifteenth Amendments. Brief for Petitioners at 43. This Court's precedents make the argument untenable. A criminal analogue to § 1985(3), 18 U.S.C. § 241, has been held to protect rights grounded in a number of different constitutional provisions, including Article I, §2 (Ex Parte Yarbrough), Article IV, §3 (United States v. Waddell), and the commerce clause (United States v. Johnson). See discussion, supra, at Section III(A).

C. Section 1985(3), to Constitute Valid Commerce Clause Based Legislation, Need not Spell Out in Text "Affecting Commerce" Standards.

Petitioners argue that to rest on the commerce clause, § 1985(3) must set out standards showing that the regulated activity affects commerce. Petitioners

cite Title VII as a model, since it defines coverage in terms of employers who employ "more than 25 [sic] employees"[23] and engage in "industry affecting commerce." Brief for Petitioners at 42.

This argument collides with another that Petitioners urge -- that § 1985(3) is only a remedial, not a substantive statute. But if § 1985(3) is only remedial,[24]

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[23] The requirement is that an employer must employ 15 or more employees. Section 701(b), 42 U.S.C. 2000e(b).

[24] The Third Circuit stated that § 1985(3) was remedial. 584 F.2d 1235, 1247. However, resolution of this question is not necessary to the disposition of the instant case since the issue is the protection of federal rights created by Title VII. The distinction between remedial and substantive legislation is significant with regard to a § 1985(3) cause of action only insofar as Fourteenth Amendment rights are at issue. In that context, the question is whether the definition of the right at issue, such as a right to equal protection, can stand alone or whether the definition must include the actor, i.e., a state official

[Footnote continued on next page]

it follows that the right it protects must exist independently. Brief for Petitioners at 37,52. There is no authority for the proposition that a remedial statute must incorporate the same substantive standards as the statute creating the substantive right. Since this case involves the use of § 1985(3) to reach employment discrimination rights created by Title VII, it is not appropriate to decide hypothetically whether the statute would need to incorporate "affecting commerce" standards to provide

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[Footnote continued]
against whose actions the right is protected. See United States v. Guest, 383 U.S. 745, 774 (1966) (Brennan J., concurring in part, dissenting in part). See also, Comment, Civil Rights -- Section 1985(3) -- Civil Remedy Provided to Redress Interference with First Amendment Right of Religious Freedom by Private Conspiracy -- Action v. Gannon, 47 N.Y.U. L. Rev. 584, 587-88 (1972).

a substantive right.[25]

Congress determined that deprivation of a Title VII right affects commerce. A fortiori, a conspiracy which deprives a person of a Title VII right necessarily affects commerce. In the case at bar, § 1985(3) creates the remedy for such conspiracies in violation of a federal right. The source of power for § 1985(3) is the constitutional authority supporting the creation of the federal right. (See discussion, supra, at Section II(A).)

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[25] Such a situation might arise where members of a private club were alleged to conspire to discriminate in employment. Title VII does not apply to private membership clubs. 42 U.S.C. § 2000e(b). Section 1981 might not apply because the employer was a private club. Runyon v. McCrary 427 U.S. 160 (1976).

D. Federal Conspiracy Statutes have been Held to be Grounded in the Commerce Clause.

In Griffin, this Court identified the right to travel as a source of Congressional power for the § 1985(3) conspiracy there in question. Both before and after the passage of the 1871 legislation now codified as § 1985(3), the Court acknowledged commerce clause underpinnings for a federally secured interstate travel right. Passenger Cases, 48 U.S. (7 How.) 283(1849); Crandall v. State of Nevada, 73 U.S. (6 Wall) 35, 44 (1867) (concurrence); Edwards v. California, 314 U.S. 160, 172 (1941). The majority decision in Edwards "was consistent with precedents firmly establishing that the federal commerce power surely encompasses the movement in

interstate commerce of persons as well as commodities." United States v. Guest, 383 U.S. at 758-59.

Infringement of the right to travel has been proscribed by federal conspiracy statutes for nearly three quarters of a century. Griffin v. Breckenridge, 403 U.S. 88 (1971); United States v. Guest, 383 U.S. 745 (1966); United States v. Moore, 129 F. 630, 633 (N.D. Ala. 1905). In addition to the right to travel, rights created by Title II, the public accommodations provision of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, have been held by this Court to be protected under 18 U.S.C. § 241. United States v. Johnson, 390 U.S. 563, 565 (1968). Title II was explicitly upheld as a constitutional exercise of Congress' commerce powers.

Heart of Atlanta Motel, Inc. v. United States;[26] Katzenbach v. McClung, 379 U.S. 294 (1964).

It is abundantly clear that Title VII rights, recognized as deriving from the commerce clause, can give rise to an

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26/ Justice Clark, In Heart of Atlanta Motel, 379 U.S. 241 (1964), distinguishing the Civil Rights Cases, 109 U.S. 3 (1883), which had declared provisions of the Civil Rights Act of 1875 unconstitutional, stated: "[T]here is language in the Civil Rights Cases which indicates that the Court did not fully consider whether the 1875 Act could be sustained as an exercise of the commerce power" 379 U.S. at 251. Thus she concluded that the opinion was "devoid of authority for the proposition that the Commerce Clause gives no power to Congress to regulate discriminatory practices now found substantially to affect interstate commerce." Id. at 262.

action under Federal conspiracy statutes.[27]

27/ In Steele v. Louisville & Nashville Railroad Co., this Court held that the Railway Labor Act, 45 U.S.C. § 151 et seq. passed pursuant to Congress' commerce clause powers, imposed a duty on a labor organization, acting under the statute as the exclusive bargaining representative, to represent all employees without discrimination because of race. 323 U.S. 192, 203 (1944). This duty implied a correlative federal right secured by the statute. Id. at 204. Having implied a statutory right, this Court then fashioned a remedy for breach of the implied statutory duty. A fortiori, this Court can apply an express Congressional remedy, § 1985(3), for violation of an express statutory right, Title VII, created under Congress' commerce powers.

IV.

THE COURT BELOW DID NOT DECIDE WHETHER A CONSPIRACY TO VIOLATE TITLE VII RIGHTS COULD BE BASED ON THE THIRTEENTH AMENDMENT. ACCORDINGLY, THE RESOLUTION OF THAT ISSUE SHOULD BE DEFERRED.

The Third Circuit made passing reference to the possibility that Congress may reach private discrimination against women under its Thirteenth Amendment enforcement power. [28/] It then stated:

> Since the application of §1985(3) to this case finds ample support in the commerce clause, however, we need not reach this argument. 584 F.2d at 1256 n. 110.

This Court should not reach the

28/ Note, Federal Power to Reach Private Discrimination: The Revival of the Enforcement Clauses of the Reconstruction Era Amendments, 74 Colum. L. Rev. 449, 451-54 (1974).

question. [29/] Supreme Court Rule 23(1)(c) provides that "[o]nly the questions set forth in the petition for certiorari or fairly comprised therein will be considered by the Court."

The constitutional question presented for review in this case is specifically

29/ The question of whether the Fourteenth Amendment provides authorization for application of §1985(3) to private employment practices that discriminate against women is also not before this Court. Decisions discussed by Petitioners on this point, e.g., Cohen v. Illinois Institute of Technology, 524 F.2d 818 (7th Cir. 1975), and Dombrowski v. Dowling, 459 F.2d 190 (7th Cir. 1972) (see Brief for Petitioners at 50) were limited to the state action question. These cases were based on Fourteenth Amendment claims but no state action was found. No Fourteenth Amendment claim is made in the case at bar. It is based upon a Title VII claim for which no state action is required or claimed. The Fourteenth Amendment question was not presented in the Petition for Certiorari and the court below declined, as should this Court, to address the issue. 584 F.2d at 1255.

"whether the commerce clause ... provides a source of congressional power...." Petitioner's Brief for Certiorari at 2 (emphasis supplied). Absent extraordinary circumstances not presented in the case, the Court will not consider questions not properly presented. See, R. Stern and E. Gressman, Supreme Court Practice §6.27, at 456-59 (5th Ed. 1978). The Court below did not decide this issue and supplied a full and adequate basis for its holding.

Should this Court decide, nevertheless, that it is appropriate to consider the issue, recent interpretations of the scope and application of the Thirteenth Amendment indicate that it is, indeed, an alternate basis for application of §1985(3) in the

instant case.30/

Early decisions discussing the Thirteenth Amendment established two general rules of application, the first expansive, the second restrictive:

1. Thirteenth Amendment protection is not limited to members of the black race.31/

2. Congressional power under the Thirteenth Amendment reaches only the eradication of conditions of

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30/ For a full discussion of the Thirteenth Amendment as a source of congressional authority to prohibit sex discrimination in private employment, see Calhoun, The Thirteenth and Fourteenth Amendments: Constitutional Authority for Federal Legislation against Private Sex Discrimination, 61 Minn. L. Rev. 313 (1977).

31/ In the Slaughter-House Cases, the Court stated:

> Undoubtedly while negro slavery alone was in the mind of the Congress which proposed the Thirteenth article, it forbids any other kind of slavery, now or hereafter. 83 U.S. (16 Wall) at 72 (1872).

slavery or involuntary servitude.[32/]

More recently, this Court has altered the second, once restrictive rule, in two ways. First, in Jones v. Alfred H. Mayer Co., the Court held that under section 2 of the Thirteenth Amendment Congress had the power to determine what are "badges and incidents" of slavery in terms of the burdens and disabilities on an individual's "fundamental rights," as well as the power to translate that determination into effective legislation. 392 U.S. at 440-41.

The question left unresolved in Jones v. Alfred H. Mayer, Co., was whether Congress' determination of "badges and incidents of slavery" depended upon a linkage between presently observable badges and incidents

32/ See Calhoun, supra n. 30 at 350-53.

and a prior legal status amounting to slavery or involuntary servitude. In McDonald v. Santa Fe Trail Transportation Co., 427 U.S. 273 (1976), this Court addressed that question.

The Court held in McDonald that 42 U.S.C. §1981, which implements the Thirteenth Amendment, proscribes private employment discrimination against whites as well as blacks. White persons in this country have never as a class labored under conditions of slavery. Thus, it is clear after McDonald that a Congressional definition of "badges and incidents of slavery" need not be linked to a prior legal status of involuntary servitude.

Since this Court has traditionally held that the Thirteenth Amendment authorizes legislation which reaches classes of persons

other than blacks, and since it has more recently held that Congress, acting pursuant to that Amendment, may prohibit private discrimination against whites, Thirteenth Amendment legislation should be interpreted to protect women as a class. Gender discrimination is a much more serious social and economic problem than is discrimination against white persons. 33/ Moreover,

33/ The seriousness of the economic, political, and psychological impact of sex discrimination in the United States has been well documented in the two volume report of hearings before Congresswoman Edith Green's subcommittee of the Committee on Education and Labor. Hearings before the Special Subcommittee on Education of the Committee on Education and Labor, House of Representatives, Ninety-First Congress, Second Session, on Section 805 of H.R. 16098, U.S. Gov't. Printing Office (1970). Government statistics reveal the extensive economic damage to women as a result of discrimination. Women who work full-time the year round average less than $60 for every $100 earned by similarly employed men. In addition, working men with college degrees earn, on

[Footnote continued on the next page]

a narrow interpretation of Thirteenth Amendment authority would produce the anomalous result that women, whose past and current legal and economic status bears a marked kinship to that of blacks 34/ would

the average, $16,000 a year while female college graduates earn $9500. The Earning Gap Between Women and Men, U.S. Department of Labor, Women's Bureau, 1976. A typical eighth-grade male graduate earns as much as a woman B.A. working full time. Hearings, supra. And the gap is increasing, not decreasing with time. The Earnings Gap Between Women and Men, supra. See also, Social Indicators of Equality for Minorities and Women, A Report of the United States Commission on Civil Rights, August, 1978.

34/ This similarity of status was noted in Frontiero v. Richardson, 411 U.S. 677 (1973):

> ...[T]hroughout much of the nineteenth century the position of women in our society was in many respects, comparable to that of blacks under the pre-Civil War slave codes. Neither slaves nor women could hold office, serve on juries, or bring suit in their own names, and married women traditionally were

[Footnote continued on the next page]

be deprived of coverage, while white males, who have not traditionally been discriminated against, would be entitled to the full reach of the Amendment's protection.

The Court's decision in McDonald reflects a principled determination to apply Constitutional provisions in light of present circumstances, freeing the scope of Thirteenth Amendment interpretation from its historical connection with persons whose ancestors were slaves. This concern for

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> denied the legal capacity to hold or convey property or to serve as legal guardians of their own children.
>
> ...And although blacks were guaranteed the right to vote in 1870, women were denied even that right -- which is itself preservative of other basic civil and political rights -- until adoption of the Nineteenth Amendment half a century later.

Id. at 684-85. This Court has also observed that sex, like race, is an "obvious badge" contributing to "the historic legal and political discrimination against women" that has been severe and pervasive. Mathews v. Lucas, 427 U.S. 495, 506 (1976). See also, G. Myrdul, An American Dilemma, 1073-78 (1972).

private discrimination which relegates persons to second-class status surely must encompass protection of individuals against sex-based animus. 35/

35/ The Fair Housing Act of 1968, 42 U.S.C. §3601-3631, which has been consistently read as the Thirteenth Amendment implementing legislation (See Calhoun, supra n. 30 at 360, notes 191, 192, 51) was amended in 1974 to include sex. Pub. L. 93-383, 1974 U.S. Code Cong. and Adm. News, pp. 4349-50.

CONCLUSION

For the foregoing reasons, the judgment of the Third Circuit should be affirmed.

Respectfully submitted,

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FOR ARGUMENT

78-753

In the Supreme Court of the United States

OCTOBER TERM, 1978

GREAT AMERICAN FEDERAL SAVINGS & LOAN ASSOCIATION, ET AL., PETITIONERS

v.

JOHN R. NOVOTNY

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES AND THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION AS AMICI CURIAE

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QUESTIONS PRESENTED

1. Whether officers and directors of a corporation, acting on behalf of the company, can form a conspiracy for the purposes of 42 U.S.C. 1985(c).

2. Whether a violation of Title VII of the Civil Rights Act of 1964 is a deprivation of "equal privileges and immunities" within Section 1985(c).

3. Whether the Commerce Clause may be invoked as a constitutional predicate for Section 1985(c) insofar as it reaches Title VII rights.

INTEREST OF THE UNITED STATES AND THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

Both the Attorney General and the Equal Employment Opportunity Commission are empowered to bring civil actions to enforce Title VII of the Civil Rights Act of 1964 and the Commission, additionally, has substantial administrative responsibilities for dealing with charges of employment discrimination. 42 U.S.C. 2000e-5, 2000e-6; President's Reorganization Plan No. 1 of 1978, 43 Fed. Reg. 19807 (1978). Accordingly, the Department of Justice and the Commission have an interest in any enforcement mechanisms that contribute to achieving the goals of Title VII. For that reason, among others, we participated as amicus curiae in this Court in *Johnson* v. *Railway Express Agency, Inc.*, 421 U.S. 454 (1975), and *Alexander* v. *Gardner-Denver Co.*, 415 U.S. 36 (1974), which considered in other contexts the question whether Title VII is the exclusive remedy for employment discrimination.

The national commitment to eliminate discrimination in public life is an independent ground for our participation in cases involving federal civil rights legislation. *E.g.*, *Runyon* v. *McCrary*, 427 U.S. 160 (1976); *McDonald* v. *Santa Fe Trail Transp. Co.*, 427 U.S. 273 (1976). That consideration prompted us to address the meaning of Section 1985(c) as

amicus curiae in *Griffin* v. *Breckenridge*, 403 U.S. 88 (1971). It seems appropriate that we speak again as that statute returns before the Court.

STATEMENT

Respondent, John R. Novotny, brought this suit against his former employer, Great American Federal Savings and Loan Association (GAF), and nine of its present or former directors and officers. Until discharged, respondent was secretary and a director of the corporation. Seeking monetary and injunctive relief, he alleged violations of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.*, and 42 U.S.C. 1985(c) (Pet. App. 77a).[1]

The complaint alleges that, in January 1975, after a female GAF employee had been discharged for protesting the company's promotion policies and after respondent had spoken out against these allegedly discriminatory policies at a meeting of the board of directors, his fellow board members voted to fire him as secretary and as a GAF employee (Pet. App. 80a-81a ¶¶ 19-24). His own discharge, he stated, was the result of "an agreement and conspiracy by and among the individual defendants to deprive Novotny of and to penalize him for the exercise of his constitutional

[1] This suit was initiated only after respondent had exhausted his administrative remedies under Title VII. Within a week of his discharge, he had filed a charge with the Equal Employment Opportunity Commission. Almost two years later, the Commission issued a "right to sue" letter under 42 U.S.C. 2000e-5. Only then did respondent resort to court proceedings.

rights to freedom of expression and association" because of his "support for equal employment opportunity for women within the GAF organization" (Pet. App. 81a-82a ¶¶ 25-26).

According to the complaint, respondent's discharge was one step in a conspiracy against female employees, the defendants having "intentionally and deliberately embarked upon and pursued a course of conduct the effect of which was to deny to female employees equal employment opportunity * * * for promotion and advancement" (Pet. App. 79a ¶ 16, 81a-82a ¶¶ 25-27).

The district court granted petitioners' motion to dismiss (Pet. App. 76a). As to the claim under Section 1985(c), the court held that officers and directors of a single corporation are legally incapable of forming a conspiracy (Pet. App. 73a). Respondent's Title VII claim was also dismissed, on the ground that Section 704(a) of Title VII, 42 U.S.C. 2000e-3(a), reaches retaliatory discharges only where the severed employee has made a charge or testified in a formal proceeding (Pet. App. 74a).

The court of appeals, en banc, unanimously reversed. That court concluded that intra-corporate conspiracies are not beyond the reach of Section 1985(c) (Pet. App. 55a). The court went on to hold that conspiracies motivated by invidious discriminatory animus against women are actionable under Section 1985(c) and that respondent as a male injured in the course of such a conspiracy has standing to sue

(Pet. App. 18a, 21a).[2] The argument that Section 1985(c) was not intended to embrace rights created by Title VII was rejected (Pet. App. 36a, 40a). So was the suggestion that constitutional obstacles prevented that result (Pet. App. 49a).

With respect to respondent's cause of action under Section 704(a) of Title VII, the court of appeals held, contrary to petitioners' argument, that Congress did not intend to restrict protection to participation in formal EEOC proceedings only (Pet. App. 59a).[3]

ARGUMENT

INTRODUCTION AND SUMMARY

1. A century ago, Congress subjected to civil and criminal liability those who "conspire * * * for the purpose of depriving * * * any person or class of persons * * * of equal privileges and immunities under the laws." Act of April 20, 1871, ch. 22, Section 2, 17 Stat. 13 (Ku Klux Act). Not long afterwards, this Court struck down the criminal portion of the statute, *United States* v. *Harris*, 106 U.S. 629 (1882), and Congress repealed that provision. Act of March 4, 1909, ch. 321, 35 Stat. 1088, 1154. The civil remedy survived, presumptively invalid and unused, until it was put out of harm's way in *Collins* v. *Hardyman*, 341 U.S. 651 (1951). Then, some eight years

[2] These latter two rulings were not challenged by the petition for certiorari.

[3] This ruling, also, was not challenged by the petition for certiorari and, accordingly, is not before this Court.

ago, the Court in *Griffin* v. *Breckenridge*, 403 U.S. 88 (1971), removed the shackles that had disabled Section 1985(c) from performing a useful role in the continuing effort to secure equal rights. That apparent liberation has proved very limited, however. The provision has not fared well in the lower courts, many obstacles having been found to restrict its application.

At length, the Court of Appeals for the Third Circuit, sitting en banc, has unanimously ruled that, in aggravated circumstances, Section 1985(c) vindicates the right to equal employment opportunities secured by Title VII of the Civil Rights Act of 1964 and that case is now here. Once again, the Court is called upon to decide the fate of the statute.

The basic question before the Court is whether Section 1985(c) shall be relegated to those now happily infrequent instances in which group violence, typically outside the area of ordinary business relations, threatens the enjoyment of fundamental rights. Since most such cases are more appropriately dealt with under criminal civil rights statutes, old and new (*e.g.*, 18 U.S.C. 241, 242, 245), such a construction of Section 1985(c) would give it a very small part indeed in the unfinished work of combating discrimination. It would be ironic, moreover, to so confine what is today a wholly civil remedial statute when its criminal analogs reach nonviolent interference with civil rights. *E.g.*, *Guinn* v. *United States*, 238 U.S. 347 (1915); *United States* v. *Mosley*, 238 U.S. 383 (1915); *United States* v. *Classic*, 313 U.S. 299 (1941); *Anderson* v. *United States*, 417 U.S. 211 (1974). Today, the promise of Section 1985(c) is fulfilled only if it

reaches concerted, but non-violent, discrimination in employment, housing and access to services.

On the other hand, we do not suggest that Section 1985(c) is a cure for all ills. On the contrary, this Court has precisely limited the thrust of the provision by insisting that it be reserved for aggravated cases in which a number of like-minded individuals, sharing a class-based invidiously discriminatory animus, join in a scheme to deprive citizens of their federally secured rights. Those conditions assure that the statute will not unduly intrude on the conciliation process. But, in our submission, there is no warrant for erecting additional barriers to the invocation of Section 1985(c). Construed consistently with its language, the provision will serve a discrete but important function both as remedial tool and deterrent.

2. The burden of our brief is to defend the decision of the court of appeals against the several challenges mounted by petitioners. We follow petitioners' sequence in dealing with their arguments.

(a) Initially, the proposition is advanced that Section 1985(c) does not reach officers or agents of the same corporation who join in fashioning or implementing a discriminatory employment policy, so long as they are acting on behalf of the company. We examine that supposed rule and show that it has no basis in corporation law, or the law of agency or tort, or in general conspiracy law. When agents of a firm, whether or not incorporated, act in such a way as to render themselves personally liable, there is no reason

in law or logic why they should not be deemed co-conspirators when they join together to achieve that unlawful end.

Looking more particularly to Section 1985(c), we find no occasion to make a special exception. On the contrary, that statute, originally written as a criminal provision, was, in our view, designed to attach individual responsibility to conspirators engaged in concerted discriminatory conduct, whether or not the participants were closely allied and furthering the interest of their principal. We note, however, that construing Section 1985(c) to reach intracorporate conspiracies does not implicate every company decision. Under the Court's holding in *Griffin* v. *Breckenridge, supra*, Section 1985(c) is applicable only when several officers or agents share a class-based invidously discriminatory animus and join in a scheme to deprive employees or applicants of their Title VII or other federal rights.

(b) We next address petitioners' contention that Section 1985(c) in no event reaches violations of Title VII. Looking to the text and the legislative history of the Ku Klux Act, we conclude that "privileges and immunities under the laws" plainly embraces rights declared by federal statutes. The object of Section 1985(c) was to provide an additional remedy for concerted action designed to prevent a class of citizens from enjoying their federal rights, whether declared by the Constitution itself or by an Act of Congress.

The suggestion that violations of Title VII, in particular, ought to be exempted from the coverage of

Section 1985(c) is quickly disposed of. In our view, this is a mere rehearsal of the argument advanced with respect to the applicability of Section 1981 and firmly rejected by this Court in *Johnson* v. *Railway Express Agency, Inc.*, 421 U.S. 454 (1975). Here, as there, recognizing an alternative remedy does not disrupt the scheme of Title VII, but, on the contrary, merely contributes to the achievement of the goal of eliminating employment discrimination.

(c) Finally, it is said that Section 1985(c) is not premised on the Commerce Clause and therefore cannot vindicate rights created under that source of congressional power. Although couched in constitutional terms, the argument is really one of statutory construction. The full answer, we submit, is that the 42d Congress—whatever its views as to the clause of the Constitution appropriately invoked—plainly meant to "put forth all its powers" (*United States* v. *Mosley*, 238 U.S. 383, 387 (1915)), and to protect *all* federal rights, both as presently established and as they might be declared in future legislation. Of course, as a purely remedial provision, Section 1985(c) is available only to those whose rights have been violated under other laws. But there is no cause to exclude Title VII rights merely because that statute, implementing the Commerce Clause, may not have been envisaged in 1871.

I. SECTION 1985(c) REACHES AN INTRA-CORPORATE CONSPIRACY

No doubt because it has won distinguished adherents in the courts,[4] petitioners set up as a first obstacle to the applicability of Section 1985(c) the supposed axiom of the civil law that the officers of a single corporation cannot "conspire" together, at least when they are acting on behalf of the company. We examine that propostion, both as a generality and in the particular context of the case.

1. The corporation is one of the law's more extravagant creations, "an artificial being, invisible, intangible, and existing only in contemplation of law," possessing "immortality" and "individuality." *Trustees of Dartmouth College* v. *Woodward*, 17 U.S. (4 Wheat.) 518, 636 (1819). In some circumstances, the consequence of incorporation is to shield from personal liability those who act on behalf of the company. That rule, we may assume, was left undisturbed by the Ku Klux Act of 1871, and we are, accordingly, content to obey usual corporate law when it requires us to look only to the unit and to ignore the human actors. But the law has never been so improvident as to disable itself altogether from "disregarding the corporate fiction whenever that is deemed necessary to attain a just result" (*Eisner* v. *Macomber*, 252 U.S. 189, 231 (Brandeis, J., dissenting) (1920)). This is such

[4] *E.g.*, *Dombrowski* v. *Dowling*, 459 F.2d 190 (7th Cir. 1972); *Girard* v. *94th St. & Fifth Ave. Corp.*, 530 F.2d 66 (2d Cir.), cert. denied, 425 U.S. 974 (1976); *Baker* v. *Stuart Broadcasting Co.*, 505 F.2d 181 (8th Cir. 1974).

a case. The facts alleged take the matter well beyond that sanctuary where individual conduct merges so completely with the corporate decision as to shield the actual wrongdoers.

It is quite right, we submit, to refuse to see a "conspiracy" under Section 1985(c) when the conduct complained of would not, under ordinary rules, render the corporate officers personally liable. Indeed, we may accept that board members, or other officers, who joined in a wrongful corporate decision innocently, or even negligently, could not be deemed "conspirators" although the corporation itself were accountable in damages. But we cannot appreciate why officers or directors who knowingly join in planning discriminatory action ought not be answerable as co-conspirators under Section 1985(c), just as they would be personally liable in tort or under 42 U.S.C. 1981 for like conduct. If the corporate veil would be pierced because the officers, although acting for the company, have overstepped the line of personal immunity, the same considerations, it seems to us, permit the court to examine the conduct of these officers under Section 1985(c).

The dispositive inquiry, in our view, is whether the kind of conduct condemned by Section 1985(c) would, as a matter of general law, subject the individual officers to personal liability, albeit they were acting on behalf of the company. Obviously, the rules governing vicarious responsibility will not answer the question. Whether the act was within actual or apparent authority may determine the liability of the corporation under the doctrine of respondeat superior. But

the accountability of individual agents is not ended merely because their principal also may be reached—whether that principal is a municipality, an unincorporated employer, or a corporation.[5] We must look more particularly at the rules that govern the personal liability of corporate officers.

It is common ground that the fiction of corporate unity does not insulate individual officers from responsibility for *criminal* conduct—even when the corporation itself is also answerable. *E.g.*, *United States* v. *Wise*, 370 U.S. 405 (1962). It is equally well-settled that corporate officers are accountable for tortious conduct, at least *intentional torts*. See, *e.g.*, *McCandless* v. *Furlaud*, 296 U.S. 140 (1935); *Davis H. Elliot Co.* v. *Caribbean Utilities Co.*, 513 F.2d 1176, 1182 (6th Cir. 1975); W. Fletcher, *Cyclopedia of the Law of Private Corporations*, §§ 1135, 1137 (rev. perm. ed. 1975). And, even more closely in point, the same rule obtains for the "tort" of discrimination under other civil rights legislation. See *Tillman* v. *Wheaton-Haven Recreation Association*, 517 F.2d 1141, 1144 (4th Cir. 1975) (42 U.S.C. 1981, 1982); *Clark* v. *Universal Builders, Inc.*, 501 F.2d 324 (7th Cir.), cert. denied, 419 U.S. 1070 (1974) (42 U.S.C. 1982); *Slack* v. *Havens*, 522 F.2d

[5] Construing the complaint as alleging a conspiracy only among the individual petitioners, the court of appeals did not reach the question of the corporation's liability (Pet. App. 52a). In those circumstances, it seems premature for this Court to consider whether the corporation itself should be deemed a co-conspirator or liable, alternatively, under the doctrine of respondeat superior.

1091 (9th Cir. 1975) (Title VII); *Tomkins* v. *Public Service Electric & Gas Co.*, 568 F.2d 1044 (3d Cir. 1977) (Title VII); *United States* v. *Northside Realty Associates, Inc.*, 474 F.2d 1164 (5th Cir. 1973) (Fair Housing Act, 42 U.S.C. 3613); *United States* v. *Pelzer Realty Co.*, 537 F.2d 841 (5th Cir. 1976) (Fair Housing Act). Cf. *Monell* v. *New York City Dept. of Social Services*, 436 U.S. 658 (1978) (42 U.S.C. 1983).

Our case, quite plainly, is within the ambit of those rules. Section 1985(c) only reaches conduct that was deemed both criminal and tortious.[6] By definition, to "conspire" is to engage in deliberate and purposeful conduct. And, at all events, this Court has expressly restricted the reach of the provision to embrace only conspirators whose conduct, informed by "class-based, invidiously discriminatory animus," is intended to deprive the victim of a legal right. *Griffin* v. *Breckenridge*, 436 U.S. 88, 102-103 (1971). Section 1985(c) requires mens rea of a special kind, well beyond the state of mind sufficient for ordinary intentional torts and under many civil rights statutes imposing personal liability.

In sum, nothing in the law of torts or agency, or corporation law or civil rights law, justifies a holding

[6] The second section of the Civil Rights Act of 1871, as originally enacted, provided both criminal penalties and a civil damage action for the same conspiratorial conduct. R.S. 1980, Act of April 20, 1871, ch. 22, Section 2, 17 Stat. 13. The criminal counterpart of Section 1985(c) was codified separately in 1874 as R.S. 5519. It was repealed in 1909. Act of March 4, 1909, ch. 321, 35 Stat. 1088, 1154.

that corporate officers acting for the company enjoy immunity from personal liability under Section 1985(c) on the ground that their conduct "merges" into that of the corporation. The remaining question is whether the law of conspiracy or some other rule peculiar to Section 1985(c) erects a special obstacle to personal liability in these circumstances.

2. It is not immediately apparent why the law should, on the one hand, hold co-directors of a corporation personally answerable for their own intentional conduct on behalf of the company, and yet, on the other, grant them personal immunity when they conspire together to the same end. If there were such a rule, however, we would expect to encounter it, not only in the context of private corporations, but wherever agents have a common master.

Except for a questionable exception under some antitrust statutes (*infra*, pages 16-17), we find no principle that co-agents are, in law, incapable of conspiracy. The contrary has been generally accepted. Thus, employees of a single municipal corporation have been held civil conspirators under Section 1985(c). *Glasson* v. *City of Louisville*, 518 F.2d 899 (6th Cir.), cert. denied, 423 U.S. 930 (1975); *Hampton* v. *City of Chicago*, 484 F.2d 602 (7th Cir. 1973), cert. denied, 415 U.S. 917 (1974). And, under other statutes, civil and criminal, co-officers or co-employees have likewise been found to have conspired. *E.g.*, *Nye & Nissen* v. *United States*, 336 U.S. 613 (1949); *Fong Foo* v. *United States*, 369 U.S. 141 (1962); *United States* v. *Sampson*, 371 U.S. 75 (1962); *Ferguson* v. *Omni-*

media, Inc., 469 F.2d 194 (1st Cir. 1972); *Johnston* v. *Baker*, 445 F.2d 424 (3d Cir. 1971).

Many of the precedents just cited, it is true, involve prosecutions under criminal statutes. The reason is that conspiracy is primarily a criminal law concept.[7] But, in our submission, the same principle governs, whether the conspiracy is condemned in a civil or criminal statute.

Petitioners quote a passage from this Court's opinion in *Callanan* v. *United States*, 364 U.S. 587, 593-594 (1961), which articulates the enhanced dangers presented by a conspiracy (Pet. Br. 19). Although that discussion is in a criminal context, it seems clear like considerations lie behind every legislative decision to outlaw conspiracies, whether by imposing criminal or civil sanctions. Surely, it is equally true of intentional torts that lend themselves to co-operative efforts that "[c]oncerted action both increases the likelihood that the [wrongful] object will be successfully obtained and decreases the probability that the individuals involved will depart from their path of [tortious conduct]." So, also, in the non-criminal arena, "[g]roup association * * * often * * * makes possible the attainment of ends more complex than those which one [tortfeaser] could accomplish." And, finally, just as among criminals "[c]ombination * * * makes more likely the commission of crimes unrelated to the original purpose for which the group was formed,"

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[7] See Note, *Developments in the Law—Criminal Conspiracy*, 72 Harv. L. Rev. 920 (1959).

so here, augmented opportunities exist for unlawful acts foreign to the original purpose of non-criminal combinations.

In the relatively few situations in which the non-criminal law singles out conspiracy, it is for the same reasons. There are no others. See Opinion of Brennan, J., in *Adickes* v. *Kress & Co.*, 398 U.S. 144, 221 (1970). At all events, in the context of Section 1985(c), it is quite impossible to fashion separate doctrines for civil and criminal liability, since, as originally enacted, the same statute imposed both civil and criminal sanctions against the identical conspiracy.[8]

Nor is there any pretext here for invoking the supposed antitrust exception. The holding that there can be no intra-corporate conspiracy under Section 1 of the Sherman Act is justified, if at all,[9] by the legislative focus in that provision on restrictive agreements between economic units, rather than individuals.[10] Accordingly, in that special context, the requirement of at least two co-operating units for a conspiracy has been applied in both criminal and civil cases. See, *e.g.*, *United States* v. *Carroll*, 144 F. Supp. 939 (S.D.N.Y. 1956). And, logically, the requirement obtains whether the economic units are partnerships or associations, rather than corporations. See *Hatley* v. *American Quarter Horse Association*, 552 F.2d 646 (5th Cir. 1977).

That special rule, it need hardly be said, can have no general application to the Ku Klux Act. The historical setting of our provision—sufficiently rehearsed in *Breckenridge*, *supra*, 403 U.S. at 98-102—forecloses any suggestion that the primary focus was on the action of economic units, rather than groups of individuals. It is equally clear that the prime targets of the law did not cease to be viewed as "conspirators" because they were acting as loyal and anonymous agents of the "Invisible Empire," rather than for purely personal reasons. Nor would anyone argue, we assume, that incorporation of the Klan in a particular area [11] immunized the local members so long as they were merely furthering "company policy." Every indication is that the authors of Section 1985(c) singled out conspiracies for the classical reason that combinations were thought to present a more serious threat than lone operators, and that they would have viewed the conspirators as all the more necessary to

[8] See note 6, above.

[9] The rationale of *Nelson Radio & Supply Co.* v. *Motorola, Inc.*, 200 F.2d 911 (5th Cir. 1952), cert. denied, 345 U.S. 925 (1953), was a departure from earlier precedent and has been criticized by commentators (see Note, *Intracorporate Conspiracies Under 42 U.S.C. § 1985(c)*, 92 Harv. L. Rev. 470, 479-482 (1978); L. Sullivan, *Handbook of the Law of Antitrust*, 323-329 (1977); Comment, *Intra-Enterprise Conspiracy Under the Sherman Act*, 63 Yale L.J. 372, 385-387 (1954)). It has not been uniformly followed in the civil antitrust context. See *Greenville Publishing Co.* v. *Daily Reflector, Inc.*, 496 F.2d 391 (4th Cir. 1974).

[10] See Note, *supra*, 92 Harv. L. Rev. at 480-481.

[11] The modern Ku Klux Klan has incorporated and its leadership operates as a private corporation. *United Klans of America, Inc.* v. *McGovern*, 453 F. Supp. 836 (N.D. Ala. 1978).

reach by federal law when they were closely organized under the umbrella of a corporation, public or private.

3. What has been said sufficiently answers any suggestion that, as a general rule, Section 1985(c) does not notice like-minded confederates when they are all officers of a single corporation. But petitioners may be advancing a narrower argument: that, in the special case of an agreement to discriminate with respect to *employment*, the employer should be viewed as unitary and internal agreements therefore beyond the reach of Section 1985(c). The propostion requires separate consideration.

The consequences of such a rule must be understood. First, the exemption, if justifiable at all, must include *all* employers, whether unincorporated associations, partnerships, single proprietorships or corporations. The "unit" concept is no sounder as applied to the officers of a corporation than to two or more partners making a hiring or promotion decision. Moreover, since (as already shown) the reasons for singling out conspiracy are the same whether the sanctions are civil or criminal, the rule suggested logically would also exempt officers and agents of an employer from liability under the criminal analog of Section 1985(c), 18 U.S.C. 241—at least when their "conspiracy" carried out the firm's policy. Thus, in a backhanded way, the result would be to make Title VII of the Civil Rights Act of 1964 the exclusive remedy for discrimination in private employment on grounds other than race—except perhaps in the rare case of agents acting contrary to "company" policy or the

unlikely situation of several distinct employers banding together to implement a common discriminatory policy. As we demonstrate in a moment, that was not the congressional understanding.

At all events, the exemption suggested for employment cases is difficult to reconcile with the personal accountability of company officers under both Title VII of the Civil Rights Act of 1964 and the Civil Rights Act of 1866. See *supra*, pages 12-13. If agents acting on behalf of their employer cannot escape individual liability under those statutes, how can a "unit" rule properly be invoked to bar their being considered "conspirators" within Section 1985(c)?

But that is not all. We can find no principled basis for exempting employment discrimination alone. Is not the policy or decision of a landlord, a railroad, a bank, a restaurant, a private school, an amusement park, equally "unitary"? Of course, in every area, there may be two or more individuals who join in acting contrary to the interests or the policy of the organization. But our concern is with the more common and more serious cases in which officers or agents are discriminating on behalf of their principal. In those circumstances, it is not possible to distinguish, as more or less unitary, a decision not to hire or promote from a decision not to sell or rent or serve or admit.

The upshot is that the "narrower argument" for exemption is, in the end, the same as the broader submission. And the practical result of sustaining either is to confine Section 1985(c) to wholly unauthorized discriminatory schemes. That would be to

render the statute useless where the most serious threat exists and where lies the greatest need of effective weapons: discrimination by established organizations. No doubt, in 1871, the major target was the Klan and the primary focus was on physical violence. But the statute then written was worded more broadly to cover all conspiracies intended to deprive citizens of equal enjoyment of any right secured by law. Here, too, we should follow the injunction announced by Mr. Justice Holmes, speaking for the Court, in *United States* v. *Mosley*, 238 U.S. 383, 388 (1915); "[N]ow that the Ku Klux have passed away * * *, we cannot allow the past so far to affect the present as to deprive citizens of the United States of the general protection which on its face [the statute] most reasonably affords." Today, conspiracies are less violent, the members often wear business suits, and discrimination is practiced in a corporate name. Yet, if Section 1985(c) is to be given "a sweep as broad as its language" (*United States* v. *Price*, 383 U.S. 787, 801 (1966)), it still condemns schemes to deny equal rights.

4. We do not suggest that Section 1985(c) reaches every discriminatory act of a corporation or other organization. First, of course, many "company" decisions are made by an individual on his sole authority. Moreover, as we have already noted, the fact that several officers join in the decision does not automatically create a "conspiracy." The teaching of *Breckenridge* is that there must be a *shared* discriminatory animus and a *joint purpose* to accomplish the prohibited injury. Thus, Section 1985(c) is by no

means co-extensive with Title VII in the area of employment discrimination. See *Griggs* v. *Duke Power Co.*, 401 U.S. 424 (1971). What is more, difficulties of proof are likely to inhibit frequent application of Section 1985(c).[12] But the allegations of the present case clearly bring it within the statute and no artificial obstacle ought to be erected to shield the alleged conspirators from liability if they have done what is charged against them.

II. SECTION 1985(c) REDRESSES DEPRIVATIONS OF RIGHTS SECURED BY TITLE VII

Constitutional objections aside (see *infra*, pages 30-34), petitioners argue that Section 1985(c) cannot be invoked to vindicate rights declared by Title VII of the Civil Rights Act of 1964. Why this should be so is not made entirely clear. But one proposition seems to be that Section 1985(c) was intended to reach only "violations of the fundamental rights of citizens" secured by the Constitution itself, as then recently amended. See Pet. Br. 24 n.18, 29. We turn first to that objection.

1. The statute on its face is plainly not confined to vindicating constitutional rights. In *Breckenridge*,

[12] Many claims brought under Section 1985(c) have been dismissed for failure to allege an actionable class-based conspiracy meeting the *Griffin* standard. See, *e.g.*, *Arnold* v. *Tiffany*, 487 F.2d 216 (9th Cir. 1973), cert. denied, 415 U.S. 984 (1974) (newspaper dealers); *Askew* v. *Bloemaker*, 548 F.2d 673 (7th Cir. 1976) (victims of illegal drug searches); *McLellan* v. *Mississippi Power & Light Company*, 545 F.2d 919 (5th Cir. 1977) (bankrupts); *Phillips* v. *International Ass'n of Bridge, S. & O. Iron Workers*, 556 F.2d 939 (9th Cir. 1977) (dissident union members).

this Court held that Section 1985(c) does protect against deprivation of the constitutional right of interstate travel and rights embraced by the Thirteenth Amendment. 403 U.S. at 104-106. But there is no suggestion in that case that rights immediately conferred by federal statutes—whatever the constitutional underpinings—are not equally within the scope of Section 1985(c). See 403 U.S. at 107. Nor has it been shown why "privileges and immunities under the laws" do not embrace all federal rights guaranteed against private invasion by the statutes of the United States. Cf. *United States* v. *Waddell*, 112 U.S. 76 (1884); *Logan* v. *United States*, 144 U.S. 263 (1892); *In re Quarles and Butler*, 158 U.S. 532 (1894). Indeed, except for the Fourth Circuit (*Doski* v. *Goldseker Co.*, 539 F.2d 1326 (1976)), every court that has considered the question has concluded that "the laws" mentioned in Section 1985(c) connotes at least some federal statutes. See, *e.g.*, *McLellan* v. *Mississippi Power & Light Company*, 545 F.2d 919 (5th Cir. 1977); *Marlowe* v. *Fisher Body*, 489 F.2d 1057 (6th Cir. 1973); *Means* v. *Wilson*, 522 F.2d 833 (8th Cir. 1975), cert. denied, 424 U.S. 958 (1976); *Lopez* v. *Arrowhead Ranches*, 523 F.2d 924, 928 (9th Cir. 1975) (by implication); *Curran* v. *Portland Superintending School Committee*, 435 F. Supp. 1063 (D. Maine 1977).

2. The correctness of this view is confirmed, if need be, by examining the legislative history of the provision. Nothing is clearer than that all those who addressed what became Section 2 of the Ku

Klux Act of 1871 (and ultimately Section 1985(c)) understood it to reach deprivations of rights conferred or confirmed by federal statutes as well as the Constitution.

It is not debatable that, as originally introduced, Section 2 protected rights defined by federal statutory law. The original bill expressly referred to "rights, privileges, or immunities of any person, to which he is entitled under the Constitution *and laws of the United States*." Cong. Globe, 42d Cong., 1st Sess. 366 (1871) (emphasis added). See, also, *id.* at 382, app. 113 (Rep. Shellabarger); 447 (Rep. Butler). The only question is whether statutory rights remained within the compass of the provision when "[t]he enormous sweep of the original language led to pressures for amendment" (*Breckenridge*, *supra*, 403 U.S. at 100) and the present wording was substituted.

The Court, in *Breckenridge*, has already identified the thrust of the narrowing amendment: "The explanations of the added language centered entirely on the animus or motivation that would be required." 403 U.S. at 100. There is no hint that rights secured by federal statutes would be removed from coverage, leaving only those derived directly from the Constitution itself. On the contrary, concern was expressed about including rights under state laws, but opponents of the original bill accepted that violations of federal statutes were properly reached. *E.g.*, Cong. Globe, *supra*, at 579 (Sen. Trumbull). The point was made explicit by Senator Thurman, a key opponent (*id.* at 822):

> If it were limited to offenses against the laws of the United States or the Constitution of the United States, it would be well worthy of consideration * * * [m]y objection to it is that it goes beyond offenses against the Constitution and the laws of the United States * * *.

And, again (*id.* at app. 218):

> [W]hat is meant by the word 'laws' in this section so far as I have read it? An intelligent court would decide that it meant the laws of the United States * * *. [13]

In sum, the opponents won their argument, not by confining the provision to constitutional rights only, but by requiring a discriminatory motivation. The upshot is that Section 1985(c) no longer created "a general federal tort law." See *Breckenridge*, 403 U.S. at 100-102. That potential objection is wholly removed by this Court's ruling that deprivations of rights are within the reach of the statute only when there is "class-based, invidiously discriminatory animus behind the conspirators' action." *Id.* at 102. Thus, Section 1985(c) remains much narrower than its criminal analog, 18 U.S.C. 241. It embraces only *discriminatory* interference with the enjoyment of federal rights.[14] That is a discrete and limited cate-

[13] See, also, *id.* at 568 (Sen. Edmunds), app. 251 (Sen. Morton).

This case, of course, does not present any question concerning the extent to which Section 1985(c) protects the right under the Fourteenth Amendment to the equal protection of state law.

[14] Petitioners asserted in the court of appeals that conspiracies against women are not actionable under Section 1985(c). The court of appeals rejected this contention (Pet. App. 16a-18a). Petitioners apparently have abandoned this argument, since they do not raise it in the petition for certiorari. However, they state incorrectly that "No other circuit has ruled on application of Section 1985(3) to sex-based classes" (Pet. Br. 18 n.12). Both the Eighth and Ninth Circuits have specifically found sex-based conspiracies actionable under Section 1985(c). *Conroy* v. *Conroy*, 575 F.2d 175 (8th Cir. 1978); *Life Insurance Co. of North America* v. *Reichardt*, No. 75-3031 (9th Cir. Jan. 11, 1979).

gory of wrongs, at the very heart of the concern that animated the 42d Congress. So construed, Section 1985(c) does no more than fulfill its intended mission.

2. It is further objected, however, that conceding the applicability of Section 1985(c) to private employment discrimination "would destroy the careful enforcement mechanism created by Congress under Title VII" (Pet. Br. 35). That argument is not unfamiliar. On many occasions, this Court has been asked to construe modern civil rights legislation as impliedly repealing or qualifying like statutes of a century earlier and has declined to do so. *Jones* v. *Mayer Co.*, 392 U.S. 409, 413-417 (1968); *Sullivan* v. *Little Hunting Park*, 396 U.S. 229, 237-238 (1969); *Johnson* v. *Railway Express Agency, Inc.*, 421 U.S. 454, 457-461 (1975); *Runyon* v. *McCrary*, 427 U.S. 160, 174-175 (1976). See, also, *United States* v. *Johnson*, 390 U.S. 563 (1968). And, specifically, the Court has rejected the argument in respect of Title VII. *Johnson* v. *Railway Express Agency, Inc.*, *supra; McDonald* v. *Santa Fe Trail Transp. Co.*, 427 U.S. 273, 285-296 (1976). See, also *Alexander* v. *Gardner-Denver Co.*, 415 U.S. 36 (1974).

These precedents are dispositive here. To be sure, there are situations in which Congress, in declaring new rights, has made it clear that they shall be enforced only in prescribed ways. *E.g.*, *Brown* v. *GSA*, 425 U.S. 820 (1976); *Santa Clara Pueblo* v. *Martinez*, 436 U.S. 49 (1978). In those circumstances, we may assume, Section 1985(c) affords no supplemental remedy. But, as the Court has expressly held, Title VII was not intended to shut off alternative avenues of relief.[15] Section 1981 remains available. There is no reasoned basis for concluding that Section 1985(c) does not.

It is true that, unlike Sections 1981 and 1982 which provide both right and remedy, Section 1985(c) merely adds a remedy for violation of a right created by other federal law, whether the Constitution or statutes, such as Title VII. In this respect, our statute is of a kind with Section 1983 which vindicates "rights, privileges or immunities secured by the Constitution and laws." Yet, it was explicitly noted in connection with the enactment of the 1972 Amendments to Title VII that Section 1983, like Section 1981, would remain applicable to employment discrimination. See H.R. Rep. No. 92-238, 92d Cong., 1st Sess. 19 (1971); S. Rep. No. 92-415, 92d Cong., 1st Sess. 24 (1971); 118 Cong. Rec. 3371-3373

[15] The relevant legislative history of Title VII on this point has so recently been recounted in this Court that we abstain from rehearsing it once again. See *Johnson* v. *Railway Express Agency, Inc.*, *supra*, 421 U.S. at 457-461; *Runyon* v. *McCrary*, *supra*, 427 U.S. at 174 n.11.

(1972). Nor has it been suggested why any difference should be made. Equally with the other statutes of the same era, Section 1985(c) serves the end of providing an "alternative means to redress individual grievances," which, in the case of Title VII, the Congress deliberately chose to preserve. 118 Cong. Rec. 3371 (1972) (Sen. Williams). See, also, *id.* at 3370 (Sen. Javits).

In any event, recognizing the applicability of Section 1985(c) to redress employment discrimination creates no practical problems. There is no cause to apprehend that Title VII will be undermined. Although Section 1985(c) may permit plaintiffs to avoid Title VII's mechanisms, there are major disincentives for doing so, as recent experience with other statutes which parallel Title VII attests.[16] The litigant who, unlike Novotny, avoids Title VII's administrative procedures foregoes substantial benefits. His claim is not investigated by the government; he therefore has no access to the results of government-funded dis-

[16] In the present case, of course, respondent did not attempt to circumvent Title VII procedures. On the contrary, he exhausted his administrative remedies.

Petitioners argue that Novotny did not name GAF's directors in his EEOC charge. That omission would not bar their inclusion as defendants in a Title VII suit. See *Canavan* v. *Beneficial Insurance Co.*, 553 F.2d 860 (3d Cir. 1977); *Chastang* v. *Flynn & Emrich Co.*, 365 F. Supp. 957, 963-964 (D. Md. 1973), aff'd, 541 F.2d 1040 (4th Cir. 1976). But if a Title VII action were foreclosed because of Novotny's omission, that would be an argument in favor of affirming the court of appeals' holding that Section 1985(c) survives as a supplemental remedy.

covery.[17] The government cannot bring suit on his behalf.[18] He is not entitled to appointment of counsel.[19] And the burden of proof is substantially more onerous: under Section 1985(c), in addition to proving the underlying Title VII violations, the plaintiff must establish the existence of (1) a conspiracy; (2) class based animus; *and* (3) an intent to deprive one of rights protected by Title VII. Compare *Griggs* v. *Duke Power Co., supra.*

Implied partial repeal of Section 1985(c), moreover, would serve no substantial public purpose. To the extent that conspirators such as GAF's officers desire the benefits of the conciliation features of Title VII, they are always available, whether or not a charge has been filed with the EEOC. See Section 705(g)(3) and (4).[20] On the other hand, to hold Section 1985(c) inapplicable would render conspiracies to violate Title VII immune from punitive and compensatory damages, neither of which may be fully available under Title VII. See *Johnson* v. *Railway Express Agency, Inc., supra,* 421 U.S. at 460. It would also permit conspirators to take advantage of the

[17] See Section 706(b) of Title VII, 42 U.S.C. 2000e-5(b); *H. Kessler & Co.* v. *EEOC,* 472 F.2d 1147 (5th Cir.) (en banc), cert. denied, 412 U.S. 939 (1973).

[18] Section 706(f)(1) of Title VII, 42 U.S.C. 2000e-5(f)(1).

[19] See Section 706(f)(1) of Title VII, 42 U.S.C. 2000e-5(f)(1).

[20] 42 U.S.C. 2000e-4(g)(3)-(4). See *Young* v. *International Telephone & Telegraph Co.,* 438 F.2d 757 (3d Cir. 1971).

fact that persons who file charges are often unsophisticated and unable to name all guilty individuals in the charge which triggers Title VII's administrative processes. Cf. *Love* v. *Pullman Co.,* 404 U.S. 522 (1972). Finally, Section 1985(c) alone reaches co-conspirators who are not employers or unions but who initiate or knowingly participate in employment discrimination, such as an insurer who compels an employer to enter an insurance contract which deliberately discriminates on the basis of race or sex.[21]

In sum, what was said in *Johnson* v. *Railway Express Agency, Inc., supra,* 421 U.S. at 459, applies equally here: "Despite Title VII's range and its design as a comprehensive solution for the problem of invidious discrimination in employment, the aggrieved individual clearly is not deprived of other remedies he possesses and is not limited to Title VII in his search for relief." There is no warrant for denying victims of invidious discrimination the additional remedy provided by Section 1985(c) in the aggravated circumtances to which that provision is uniquely addressed. And the potential of such a recovery against the individual participants in an intentionally discriminatory scheme can only serve as a salutary deterrent.

[21] Contrary to petitioners' assertion (Pet. 13, n.9), Section 1985(c) would not reach employment discrimination by employers with fewer than 15 employees, since no underlying Title VII violation could be established against such an employer. See, *infra,* pages 33-34.

III. SECTION 1985(c) IS CONSTITUTIONAL AS APPLIED TO VIOLATIONS OF TITLE VII

1. There is, in truth, no constitutional question in the case.[22] No serious contention could be made that Congress lacks power to reach those who conspire to violate rights declared by a federal statute, itself of undoubted constitutionality. Indeed, the Court has recognized the constitutional propriety of affording a remedy against wholly private action that interferes with the exercise of rights originally protected only against hostile State action. *United States* v. *Guest*, 383 U.S. 745, 761 (1966) (Clark, J., concurring), 774 (Brennan, J., concurring and dissenting). But, however that may be, no issue can arise when, as is the case under Title VII, the substantive right itself runs against private discrimination and the remedial statute merely provides alternative relief. Insofar as it reaches private action, that has been the premise of the decisions under 18 U.S.C. 241 since *United States* v. *Waddell*, *supra*. Nor is it any objection that the "vindicating" statute casts a wider net, encompassing "outsiders" who seek indirectly to deprive the intended beneficiary of substantive federal rights elsewhere declared. *United States* v. *Johnson*, *supra*.

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[22] Because the court of appeals regarded the Commerce Clause as a fully adequate source of congressional power, it declined to reach the question whether the Thirteenth or the Fourteenth Amendment would support the application of Section 1985(c) to Title VII rights (Pet. App. 46a, 50a n.110). For the same reason, we agree that it is unnecessary to reach these constitutional issues.

As we understand it, these propositions are unchallenged. Instead, although they speak of "constitutional" impediments, petitioners argue that Section 1985(c) was not intended to implement legislation premised on the Commerce Clause. That is, of course, a purely statutory question. Cf. *United States* v. *Price*, 383 U.S. 787, 789 (1966).

2. We note, first, that in *Breckenridge* the Court identified the right of interstate travel as one of the "privileges and immunities" protected by Section 1985(c). 403 U.S. at 105-106. The constitutional origin of that right was not identified, except for the statement that it "does not necessarily rest on the Fourteenth Amendment." *Id.* at 105. Plainly, it was deemed unnecessary to determine whether the drafters of Section 1985(c) expressly invoked whatever constitutional provisions established the right to travel interstate. The same approach was followed in *United States* v. *Guest*, *supra*, in reaching the conclusion that 18 U.S.C. 241 vindicates the same right. 383 U.S. at 759. So here. As it happens, moreover, the right of interstate travel may derive from the Commerce Clause. See *Shapiro* v. *Thompson*, 394 U.S. 618, 630 (1969); *United States* v. *Guest*, *supra*, 383 U.S. at 758-759; *Edwards* v. *California*, 314 U.S. 160, 174 (1941); *Passenger Cases*, 48 U.S. (7 How.) 283, 492 (1849) (Taney, C.J. dissenting); *Crandall* v. *State of Nevada*, 73 U.S. (6 Wall.) 35, 49 (1867) (Clifford, J., dissenting).

So long as it is clear that Congress meant to reach aggravated violations of *all* federal rights—save per-

haps those conferred with exclusive enforcement mechanisms—it cannot matter whether each of the potentially applicable sources of legislative power was identified at the time. Cf. *Ex parte Yarbrough*, 110 U.S. 651, 658, 666 (1884). And it is equally irrelevant that the 42d Congress may have entertained a broader view of the Privileges and Immunities Clauses of both Article IV and the Fourteenth Amendment, and a narrower view of the Commerce Clause, than obtains today, provided it intended to "put forth all its powers." *United States* v. *Mosley*, *supra*, 238 U.S. at 387-388. Indeed, if all federal rights were meant to enjoy the protection afforded by Section 1985(c)—albeit only when threatened by invidiously motivated conspiracies—there can be no objection to including Title VII rights merely because the enactment of such a statute was not envisaged in 1871. Any other rule would confine Section 1985(c) to rights already declared, and, in this respect, there is no more basis for so restricting the broad language of our provision than in the case of its criminal analog, 18 U.S.C. 241. See, *e.g.*, *United States* v. *Johnson*, *supra*; *United States* v. *Classic*, 313 U.S. 299, 315-320 (1941).

3. We have already discussed the breadth of Section 1985(c) and shown it to be what its words indicate, a general statute enacting a remedy—and a deterrent—for aggravated group action, animated by class bias, which is intended to deprive citizens of rights secured by federal law. What we have noticed in the legislative history of the provision makes clear that "privileges and immunities under the laws" include all federal statutory rights, present and future, whatever their constitutional underpinnings. Lest any question remain, one or two further references may be appropriate.

The sponsors of the legislation left no doubt that they meant to invoke every source of power. Not only were the Thirteenth, Fourteenth and Fifteenth Amendments expressly mentioned, but also the Privileges and Immunities Clause and the Republican Form of Government Clause of Article IV. Cong. Globe, *supra*, at 500 (Sen. Frelinghuysen). More broadly, it was said that Congress must act to "the uttermost bound * * * of its constitutional power" (*id.* at 691 (Sen. Edwards)), and carry out "all the powers in the Constitution" (*id.* at 382 (Rep. Hawley)). Senator Edmunds, the leading Senate sponsor, was explicit that the provision would vindicate rights created by all federal statutes, present and future. As he said, it would extend to "the rights which the Constitution and the laws of the United States made pursuant to it give to [citizens], * * * whatever those laws may be." *Id.* at 568. Of course, as the Court noted in *Breckenridge*, the provision was narrowed to reach only concerted action motivated by hostility to a class of citizens. But all rights conferred by federal law remain protected against such invidious conspiracies.

4. Only one point remains: the suggestion that Section 1985(c) purports to reach employers not within the coverage of Title VII. There is simply no basis for that objection. As we have sufficiently ex-

plained, Section 1985(c) merely affords a remedy to those whose Title VII rights have been violated in a particular way. It follows that persons not under the umbrella of Title VII are not entitled to invoke Section 1985(c). There is thus no question of constitutional overreaching.[23] The two statutes operate in complete harmony, and their coexistent applicability serves to effectuate the congressional purpose underlying each of them.

[23] If there were, *Breckenridge* teaches that possible unconstitutional applications are no ground for declining to give Section 1985(c) its permissible reach in a case plainly within constitutional limits. 403 U.S. at 104.

CONCLUSION

For the reasons stated, the judgment of the court of appeals should be affirmed.

Respectfully submitted.

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MARCH 1979

☆ U. S. GOVERNMENT PRINTING OFFICE: 1979 289973 369